IN THE
Supreme Court of the United States
OCTOBER TERM, 1945

No. 58

JOACHIM O. FERNANDEZ, UNITED STATES COLLECTOR OF INTERNAL REVENUE,
Appellant,

v.

SAMUEL G. WIENER, WILLIAM B. WIENER, AND JACQUES L. WIENER
Appellees.

On Appeal from the District Court of the United States For the Eastern District of Louisiana.

BRIEF FOR THE APPELLEES.

SIDNEY L. HEROLD,
CHARLES E. DUNBAR, JR.,
Attorneys for Appellees.

ESMOND PHELPS
S. L. HEROLD, JR.
Of Counsel.

HAUSER PRINTING CO., INC., NEW ORLEANS

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INTRODUCTION

The decision below (R.12) is reported in 60 Fed. Supp. page 169.

The case comes here on direct appeal from a judgment of the District Court for the Eastern District of Louisiana (50 Stat. 751). Probable jurisdiction has been heretofore noted (R.23).

The sole questions involved are the constitutionality of Section 402(b)(2) and of Section 404(a) of the Federal Revenue Act of 1942; both of which provisions were held by the District Court to be in conflict with

the due process clause of the Fifth Amendment to the Federal Constitution (R.19). The appellees contend that this constitutional infirmity proceeds not only from conflict with the Fifth Amendment, but also because the statute is violative of Section 8 of Article I of the Constitution and of the Tenth Amendment.

THE STATUTE INVOLVED

The provisions of the Federal Revenue Act of 1942 whose constitutionality is the issue here, are amendments to Section 811 of Title 26 of the United States Code. These provisions (56 Stat. 942), so far as they relate to the issues of this case, are as follows:

> (b) General Rule. — Section 811 (e) (relating to joint interests) is amended as follows:
>
> (1) By striking out "(e) *Joint Interests.*—" and inserting in lieu thereof
>
> "(e) **Joint and Community Interests.**—
>
> "(1) Joint Interests.—"
>
> (2) By inserting at the end thereof the following new paragraph:
>
> "(2) **Community Interests.** — To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

Sec. 404. **Proceeds of Life Insurance.** (a) General Rule. — Section 811 (g) (relating to life insurance) is amended to read as follows:

"(g) Proceeds of Life Insurance.—

"(1) Receivable by the Executor.—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

"(2) **Receivable by other beneficiaries.**—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, **or** (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the puposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

* * *

"(4) **Community property.** For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, ex-

cept such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

STATEMENT OF THE CASE

The action was brought below by the universal legatees, and hence the sole heirs of Sam Wiener, Jr., a citizen of Louisiana, who died there subsequent to the enactment of the statutory provisions whose constitutionality is here at issue.

Mr. Wiener's succession having no debts of any consequence, no administration was had; but the appellees were, by judgment of the proper probate court, sent into possession of all of the property of the decedent (R.8), and thereafter proceeded, as required by law, to file their estate tax return. In that return, they intentionally disregarded the statutory provisions here in controversy: returning only that which they had inherited under the local law. A deficiency assessment was later proposed by the Bureau of Internal Revenue based upon the inclusion in the taxable net estate, of the total value of all the property of the marital community that had existed under the laws of Louisiana between the decedent and his surviving wife.

That deficiency assessment was paid, and this suit, after rejection of claim for refund, was brought against the Collector of Revenue, to whom payment had been made, for recovery back of these additional taxes which had been paid solely to prevent the accumulation of penalties (R.10). The case was submitted to the District

Court upon an agreed statement of facts (R. 7 et seq), which was adopted by the District Court as its findings (R.19). Upon the basis of these facts, the District Court concluded that the statutory provisions at issue were violative of the Fifth Amendment and, therefore, void; and for that reason entered judgment for plaintiff (R.19) for the amount sued for.

SUMMARY OF ARGUMENT

The controlling facts are stipulated (R.8):

> "The said decedent was married in 1907, in Shreveport, to Florence Loeb, with whom he lived in that relation until his death.
>
> "During the marriage, said Sam Wiener, Jr. was engaged in many different kinds of business, such as the grocery business, lumber business, real estate and later, in investments of various character. All assets of every character, movable and immovable, which stood of record or in the possession of the decedent at the time of his death (with the exception of certain realty in Mississippi) was acquired by, and fell into the ownership of the marital community which had existed between him and his surviving wife. At no time during the existence of the community was Mrs. Wiener ever employed in a gainful occupation outside of the household, nor did she receive from anyone salary or other compensation for such personal services, nor was any part of the community property derived originally from any separate property owned by Mrs. Wiener."

The marital community is "traditional" in Louisiana. It is "a system dictated by state policy as an incident of matrimony", *Commissioner of Internal Revenue v. Harmon*, 323 *U. S.* 44. As part of the social and economic system of the State, it not only long antedates the Sixteenth Amendment, but the Constitution itself. Al-

ways, it has underlain the family law and hence the social order of the State. Under the local law, all earnings and all assets (with the exception of certain acquisitions acquired by gratuitous, as opposed to onerous title), whether nominally in the name of one or the other of the spouses is, as an incident of the marital relation, an acquet of the two partners as equal co-owners or tenants in common.

Succession of Wiener, 203 La. 649, 666, and cases cited.

In *Bender v. Pfaff*, 282 U. S. 127, 132, this Court, in speaking of the community relation, pointed out:

> "The wife has a present vested interest in community property equal to that of her husband",

and that (131):

> "Each spouse may by will dispose of only his or her one-half of the community, and is powerless to affect the other's half. In case of death intestate one-half descends to the heirs of the decedent and the other spouse is powerless to prevent this."

Furthermore, this Court noted that its decision in *Warburton v. White*, 176 U. S. 484, and in Arnett v. *Reade*, 220 U. S. 311, had been cited by the Supreme Court of Louisiana

> "indicating that the exposition of the wife's rights and of the nature of the community therein contained correctly states the Louisiana doctrine."

(1) Based upon the settled law of Louisiana that husband and wife each owns by the very fact of acquisition during the marriage an undivided one-half interest in every asset of the community, it is the contention of

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the appellees that a statute which purports to measure by the value of the whole, the tax upon the transmission of title to an undivided one-half interest, is arbitrary and capricious and, hence, is violative of the due process of law guaranteed by the Fifth Amendment. *Hoeper v. Tax Commission*, 284 U. S. 206; *Knowlton v. Moore*, 178 U. S 41; *Nichols v Coolidge*, 274 U S 531; *Heiner v. Donnan*, 285 U. S. 312.

Manifestly, if to justify the constitutional validity of the statute, resort be had to a disregard or modification of the law of the State relating to the property rights or incidents thereof of the partners in the marital community, such result would be to impute to Congress an attempt to interfere with what is essentially a reserved right of the states; namely, to define and regulate the ownership of property of its citizens and located within its limits. See observation of the Court in *Pennoyer v. Neff*, 95 U. S. at page 722. This would be squarely in the teeth of the Tenth Amendment.

Indeed, the framers of the original Constitution never contemplated that any such power could exist in the Federal Government which they were to form. See *The Federalist*, No. 31.

The law of the State is that, as interpreted by its highest Court. *Erie Railway Co. v. Tompkins*, 304 *U. S.* 64.

The attempt in the statute to classify the community partnership through analogy to the tenures known as "tenancy by the entirety" and "joint tenancy" is utterly wanting in merit. In each of these cases, the former tenure is converted into the sole ownership of the survivor by the mere fact of the death of one of the spouses.

In the case of the community in Louisiana, the hus-

band owns an undivided one-half and the wife the other undivided one-half. Hence, their relation is legally that known at common law as "tenants in common". Each may transmit at death, testate or intestate, only that undivided one-half interest which had been owned by the decedent at the instant of termination of the marital partnership. Manifestly, an attempt to impose a tax upon the transmission by death of the title of an ordinary tenant in common based upon the value of the whole of the property, would fail under the due process clause. Yet, that is the exact analogy here.

In the two cases upon which the Solicitor General relies (based, in the one instance upon a tenancy by the entirety, and in the other, the case of a joint tenant, to-wit, *Tyler v. United States*, 281 *U. S.* 497, and *United States v. Jacobs*, 306 *U. S.* 363), the tenure in each case had been gratuitously created. In each case, the right of Congress to tax might well have proceeded upon its power to levy the exaction upon all such anticipatory tax-avoiding arrangements.

Moreover, as pointed out in both cases, "the grand incident" of each tenure, upon which this Court justified the right to measure the tax upon the value of the whole property was "survivorship"; i. e. the acquisition of entire and unconditional ownership by the survivor merely through the fact of death of the other owner. The economic benefit in such case was through the devolution of title. There is no survivorship in the community property law of Louisiana: the title of the deceased partner passes to the legal heirs in intestacy and is completely subject to the power of testamentary disposition. Hence, there is no shifting of title in favor of the survivor in the case of the death of a member of the community partnership.

The Solicitor General contends that the statute may be saved, because the death of the husband puts an end to that power of management and control which he possessed during the existence of the community partnership. Manifestly, however, one gains no economic benefit by the loss of a chosen agent. This Court has previously pointed out (*Poe v. Seaborn*, 282 U.S. 101, 113) that the husband's power of management "by no means negatives the wife's present interest as a co-owner". The Supreme Court of Louisiana in *Succession of Wiener, supra*, page 669, likens the marital partnership to a

> "limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract."

That such managerial powers do not constitute property rights was long ago held by this Court, *Warburton v. White, supra*, quoted in *Poe v. Seaborn, supra*, page 112, and this Court was careful to point out in *Bender v. Pfaff, supra*, page 132, that the limitations upon the husband's power are more stringent in Louisiana, where unfaithful or dissolute management entitles the wife to "bring about an immediate dissolution and liquidation of the community property". See, also, *Reinecke v. Northern Trust Co.*, 278 U. S. 339 (367).

Nothing in *Moffitt v. Kelly*, 218 U. S. 400, is authority for a different conclusion. The Court there was careful to point out

> "The nature and character of the right of the wife in the community for the purpose of taxation

> was peculiarly a local question which we have no power to review".

See *Coolidge v. Long*, 282 U. S. 582, 600.

However, if the disappearance of the husband's power of management by reason of his death could be said to constitute an economic benefit to the wife, it would necessarily follow that the death of the wife (which, of course, operates to deprive the husband of all power of management and control over his wife's half) could not be an economic benefit to him. One does not benefit by the loss of a right.

Yet, the statute bases the tax upon "the interest therein held as community property by the 'decedent' and 'surviving spouse' ". The statute makes no reference to "husband" nor to "wife". Either "decedent" or "surviving spouse" may be husband or wife. The Act carefully refrains from any mention of gender. The statute, therefore, applies equally in either case; i. e. of the predecease of husband or of wife. It does not permit of separation and must stand or fall as a whole.

On pages 68 to 74 of this brief are collated the multitude of cases from this Court sustaining the doctrine so concisely stated by Mr. Justice Holmes in *United States v. Ju Toy*, 198 U. S. 253, 262:

> "The relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

(2) The Statute violates the uniformity clause of Section 8 of Article I of the Constitution.

Under its own express terms, the statute refrains from operation in respect of any tenancy in common other than that which constitutes community property "under the law of any state, territory or possession of the United States".

Other similar common ownerships and partnerships are left free from the effect of the taxing statute. It is only where the partnership is created by the law of a particular state or territory that the statute operates. Its effect is, therefore, carefully and avowedly limited to operation upon that class of tenancies in common known as community partnership property, when that partnership is the result of the law of any of the eight traditional community property states. By its own terms, it has no effect upon tenants in common in the other forty states.

Estate taxes, being excises, must be uniform throughout the United States. The statute here is void, therefore, as lacking in geographical uniformity.

It would seem, moreover, that the incidence of the tax upon the surviving spouse growing out of exaction upon property owned before the death of the decedent, would be a direct tax and hence, not being apportioned according to population, would be void under Clause 3, Section 2, and under Clause 4 of Section 9 of Article I of the Constitution. Such is specially pleaded.

(3) Section 404(a) of the Revenue Act is assailed upon the identical grounds upon which the attack is leveled on Section 402(b)(2). This, because there had been included in the deficiency assessment the proceeds of life insurance taken out by the deceased during the marriage, and paid for with community funds, with the wife as beneficiary (R.8).

The law of Louisiana is that such policies are community property, and the proceeds payable at death likewise an asset of the community. *Succession of LeBlanc*, 142 La. 27; *Berry v. Franklin State Bank*, 186 La. 623, 635, and cases cited. This jurisprudence is recognized in *Howard v. United States*, 125 Fed. (2d) 986. Compare *Lang v. Commissioner*, 304 U. S. 264 In view of the settled State law, the same arguments as to community property generally are applicable to the proceeds of life insurance belonging to the community partnership.

ARGUMENT

In demonstrating the invalidity of the Federal Statute here in question (Section 402 (b) of the Revenue Act of 1942), we desire briefly to review the nature and sources of community partnership property in Louisiana and then analyze the statute itself. When the statute is considered against the background of the community partnership systems to which it is addressed, its arbitrary, capricious and discriminatory character becomes apparent.

NATURE OF COMMUNITY PARTNERSHIP PROPERTY

The nature of community partnership property is well known to this Court. It was summarized by this Court in *Bender vs. Pfaff*, 282 *U. S.* 127, which dealt with the Louisiana community partnership system; and also by the highest court of Louisiana in the *Succession of Wiener*, 203 *La.* 649, 14 *So.* 2*d.* 475, decided June 21, 1943, and is explained and established in the Articles of the Louisiana Civil Code and numerous other Louisiana

Supreme Court decisions.[1] These opinions are controlling as to the property interest owned by the husband and the surviving spouse during his lifetime, and at the time of his death, and as to the rights which terminated at the husband's death. As detailed in the Articles of the Louisiana Civil Code and in these opinions, the property rights of the husband and surviving wife in the community partnership property may be summarized as follows:

1. Every marriage contracted in Louisiana, by virtue of the provisions of the Louisiana Civil Code, as interpreted by the Supreme Court of Louisiana, superinduces of right a partnership between husband and wife.

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[1] See also *Phillips v. Phillips*, 160 La. 813, 107 So. 584; *Dixon's Executors*, 4 La. 188; *Theall v. Theall*, 7 La. 226; *Succession of Wiener*, 203 La. 649, 14 So. (2d) 475; *Bender v. Pfaff*, 282 U.S. 127; *Succession of Marsal*, 118 La. 212; *Succession of May*, 120 La. 692; *Leibman v. Fontenot*, 275 F. 688; *Warburton v. White*, 176 U.S. 484; *Arnett v. Reade*, 220 U.S. 311; *Childers v. Johnson*, 6 La. Ann. 634 at p. 641; Louisiana Revised Civil Code Arts. 2404, 2399, 2402, 2334, as amended by Act 170 of 1912 and Act 186 of 1920, 2386, 2385, 2406, 140 to 161, inclusive, 160, as amended by Act 21 of 1928, 2425 to 2437, inclusive, 2403, 2408, 915, 916, 123, 136, 138, 149, 150, 155, 159, 2446, 2329, 1790, 1749; *Melady v. Succ. of Bonnegent*, 142 La. 534; *Bister v. Menge*, 21 La. Ann. 216; *Radovich v. Jenkins*, 123 La. 355; *Snowden v. Cruse*, 152 La. 144; *Ramsey v. Beck*, 151 La. 190; *Succ. of Moore*, 42 La. Ann. 331, at p. 341; *Smallwood v. Pratt*, 3 Rob. 132; *Davock v. Darcy*, 6 Rob. 342; *Glenn v. Elam*, 3 La. Ann. 611; *Dillon v. Treville*, 129 La. 1005; *Succ. of Casey*, 130 La. 743; *Succ. of Goll*, 156 La. 910; *Lob's Sons v. Karnofsky*, 177 La. 229, 148 So. 34; *Succ. of Hayes*, 33 La. Ann. 1143; *Succ. of Moore*, 40 La. Ann. 531; *Bossier v. Herwig*, 112 La. 539; *Brooks v. House*, 168 La. 542; *Burton v. Brugier*, 30 La. Ann. 478; *Webre v. Lorio*, 42 La. Ann. 178; *Coreil's Estate*, 137 La. 702; *Dillon v. Dillon*, 35 La. Ann. 92; *Succ. of Lebesque*, 137 La. 567; *Crochet v. Dugas*, 126 La. 285; *Williams v. Goss*, 43 La. Ann. 868; *McClelland v. Gasquet*, 122 La. 241; *Hill v. Hill*, 115 La. 490; *White v. White*, 153 La. 313, 159 La. 1065; *Lockhart v. Dicey*, 161 La. 282; *Nichols v. Her Husband*, 7 La. Ann. 263; *Ford v. Kittredge*, 26 La. Ann. 190; *Houghton v. Hall*, 177 La. 237, 148 So. 37; *Succ. of Howell*, 177 La. 276, 148 So. 48; *Hellberg v. Hyland*, 168 La. 493; See also authorities and statutes quoted in brief for respondent in the Supreme Court of the United States in the matter of *Jacob O. Bender v. William Pfaff*, Docket No. 86, October term, 1930, 75 L. Ed. 252, 282 U.S. 127 to 132, filed on behalf of respondent and Louisiana taxpayers, by Charles E. Dunbar, Jr., and Monte M. Lemann of New Orleans, pages 23 to 43, inclusive; Opinions of Acting Attorney General Mitchel in 1927, and Opinions of Attorney General Daugherty in 1924; Attorney General Stone in 1924, and Attorney General Sargent in 1926; see 32 Op. Att. Gen. 298, 435; 34 Ibid. 376, 395; 35 Ibid. 89, 265; General Counsel Memorandum, 6351; 32 Op. Att. Gen. 435; T.D. 2090, 2137, Of. Dec. No. 246, reported at 2 C.B. 198, T.D. 3071, reported at 3 C.B. 221; and T.D. 3138.

This community partnership is a partnership in which the husband and wife own equal shares, the title of each spouse thereto vesting at the very instant such property is acquired by the community partnership.

2. The Louisiana Supreme Court has repeatedly announced that the theory and policy of the Civil Law is that the acquisition of all property (with certain exceptions such as property acquired by gift, devise or inheritance) during the marriage "is due to the joint or common efforts, labor, industry, economy and sacrifice of the husband and wife; in her station the wife is just as much an agent in acquiring this property as is her husband." (*Succession of Wiener, supra.*)

3. The wife is an equal owner (tenant in common) with her husband in all of the community partnership property. The wife's rights, interest and title are equal to the husband's and are of equal dignity.

4. The wife's right in and to half of the community partnership property does not rest upon any **gratuity** of her husband; she earns it and is owner of this property, because the law of Louisiana vests her with ownership of it at the time of its acquisition by the community partnership.

5. The wife does not take her title through or under the husband; he never earned any interest in her portion of the property, inasmuch as she acquired it by onerous title at the very moment of its acquisition by the community partnership and she continued uninterruptedly to hold such title so long as the property remained an asset of the community.

6. The husband owned no interest in the wife's portion of the partnership property when the community partnership terminated with his death. Her portion

of the community partnership assets is not subject to the payment of his debts and he cannot and did not dispose of it by will. Upon his death, his one-half passes to his heirs or legatees; she simply retains the equal interest in the property which she owned as a tenant in common prior to her husband's death.

7. The relationship is analogous to a limited commercial partnership at common law in which the husband and wife are equal half partners. The husband, invested with management by the fact of marriage and by statute, stands in the same category as a contractual managing partner or agent in common law states. As the Supreme Court of Louisiana in the *Succession of Wiener, supra,* has said: "There is no substantial difference between her (the wife's) interest therein and the interest of an ordinary member of a limited partnership, the control and management of whose affairs, has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract", and as this Court has said in *Poe v. Seaborn, supra*: "the powers of partners, or of trustees of a spendthrift trust, furnish apt analogies."

8. The husband is expressly denied, by statute, the right to give away, dispose of, or deal with the community partnership property or income in fraud of his wife's property rights in half of the community partnership and community income. If the husband, as fiduciary and managing partner, is a dishonest manager or disposes of the community property in fraud of his wife's rights, the wife has the right at any time during marriage (without obtaining a separation or divorce) to have the com-

munity partnership dissolved, to have a partition of the community property and the delivery to her of her half interest, and in the same dissolution and partition proceeding, the husband is accountable and must reimburse the wife for any loss which she has sustained as owner of one-half of the community partnership by reason of the husband's violation of his fiduciary obligations.

9. If the husband proves to be a wasteful, bad, or incompetent manager and agent, or if his financial affairs are in such disorder as to jeopardize the wife's half interest in the community partnership or her future acquisitions or earnings, she likewise has the right to a separation of property and a partition of the community partnership and the delivery to her of her half interest and, as in the case of fraud, the husband is accountable to the wife in the same proceeding for any losses she may have sustained as a result of the violation of his obligations.

10. If the husband, in violation of his fiduciary obligation as manager of the community partnership, uses any part of the community partnership property or income for the benefit of his separate estate, he becomes a debtor to the community and must reimburse the community partnership estate.

11. If the husband pays his separate debts out of the community partnership funds, he must reimburse the community partnership the amount so paid.

12. The husband has testamentary disposition over his half of the community partnership property and the wife enjoys full power of testamentary disposition over her half interest in the property. She can will it to whom she chooses, even to her **paramour**, and her husband is powerless to prevent it.

13. At the husband's death, without a will, his half of the community partnership property passes to his heirs. Similarly at the wife's death, without a will, her interest passes to her heirs-at-law, even though those heirs be illegitimate children by another man, and her husband is powerless to prevent such inheritance.

14. In the case of a judicial separation without divorce, the wife again has the right to a liquidation of the partnership and the partition and the delivery to her of her half interest.

15. In the case of a divorce, the community partnership is dissolved and partitioned and the wife has the right to her one-half interest, even though she be guilty of the grossest sort of misconduct, such as adultery, and the Court is powerless to deliver to her any less than her full one-half interest. The right of the wife in this connection is independent of any question of fault or alimony, which is governed and regulated by separate statutes. The wife's right in the event of divorce, to remove the husband as manager of the community partnership and have the partnership dissolved and liquidated and to receive immediately one-half of the community partnership property and income results from the fact that in Louisiana she is the owner, as tenant in common, of one-half of the community partnership property and income.

16. The wife's one-half interest is subject to the payment of her one-half of the community debts incurred during the existence of the community partnership.

17. The husband and wife in Louisiana each own an undivided one-half in each and every asset of the community partnership property and income as "tenants in common" as contradistinguished from "joint tenants" or "tenants by the entirety" as the last two mentioned

legal tenures are defined and known in common law states.

18. The wife is liable for income taxes on the property which represents her one-half of the community partnership income.

19. At the wife's death, her legatees or heirs are liable for Louisiana Inheritance Taxes for the privilege of receiving her half interest in the community partnership property.

20. At the wife's death, her estate, prior to the 1942 amendment, was liable for the Federal Estate Taxes imposed on the privilege of transmitting her half interest in the partnership property at death.

The above partial summary clearly shows that both in law and fact the wife in Louisiana is the actual owner of a full one-half undivided interest in the community partnership property, and is possessed of all of the legal incidents of ownership. The limited, safeguarded and permissive management granted to her husband is that of a managing partner. The husband's interest as managing partner is not a beneficial interest. It is that of a fiduciary and is limited both in scope and duration. While the husband may, as agent or manager, invest and reinvest the proceeds of any sale of community partnership property, any property so acquired immediately becomes community partnership property in which his wife possesses a full one-half interest. His management of her interest in the property terminates upon separation, upon divorce, upon a showing of fraud, or even upon a showing of bad or incompetent management or when his financial affairs are in disorder and the wife's property rights are endangered. The wife possesses the entire bundle of rights that go to make up actual ownership of property. The

husband possesses only limited managing powers as agent, or managing partner for his wife.[2]

Prior to the Estate Tax Amendment in the Revenue Act of 1942, the Estate Tax was applied to community partnership property in the same way that it was to all other property: the tax was measured by the value of the property which passed by reason of the death of the decedent. In no case was the tax measured by property which the decedent did not own at death, and which the decedent had never owned. Under the prior law, since each spouse in a community partnership property state owns one-half of the community partnership estate, and the survivor's one-half is not derived from and had never been owned by the decedent, the Federal estate tax imposed upon the estate of the first to die, whether husband or wife, was measured by the value of decedent's one-half of the community partnership estate. Upon the survivor's death, the survivor's half of the property was similarly taxed. Thus the property interest of each spouse in the community was taxed on the same basis as the property of any other decedent. (T. D. 2450, T. D. 3138, T. D. 3670).[3]

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[2]Rules in the other several community property states are substantially the same with some minor variations. See *Poe v. Seaborn*, 282 U.S. 101 (Wash.) *Jacob O. Bender v. Wm. Pfaff*, 282 U.S. 127 (La.); *Fred O. Goodell v. O. B. Koch*, 282 U.S. 118 (Ariz.); *Hopkins v. Bacon*, 282 U.S. 122 (Tex.); *U. S. v. Malcolm*, 282 U.S. 792 (Calif.). See also *Warburton v. White*, 176 U.S. 484; *Arnett V. Reade*, 220 U.S. 311. In some States the income from the separate property of the spouses does not become community partnership property.

[3]The Treasury Department Decision applying the Federal Estate Tax to Community Estates of spouses residing in Texas, on this basis, was the first ruling on the subject and was promulgated as early as August 24, 1920 as T.D. 3071. It clearly recognized the distinction between community estates and estates by the entirety.

The second Treasury Decision relative to the application of the Estate Tax to community estates generally, was promulgated March 3, 1921 as T.D. 3670, and was predicated upon the opinion of Attorney General Palmer dated February 26, 1921. It applied the same rule as previously applied in Texas to spouses residing in the states of Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada.

Treasury Decision 3670 was the result of a review of prior rulings regarding the application of the Federal Income Tax Act and the Fed-

RESPONSE TO THE OBSERVATIONS CONTAINED IN THE SOLICITOR GENERAL'S BRIEF UNDER THE HEADING "THE WIFE'S INTEREST UNDER LOUISIANA COMMUNITY PROPERTY LAW"

The Solicitor General, in his brief (pp. 13, 14, and 19) explains that he recognizes and does not attack the authority of the *Pfaff, Seaborn, Hopkins* and other community property cases, or the decisions of the Supreme Court of Louisiana holding that the wife is an equal owner of an undivided one-half of the community partnership property. After making this admission, however, the Solicitor General proceeds to make the same arguments with reference to the Louisiana Community Partnership Law which were contained in the Solicitor General's brief in the *Pfaff* and *Seaborn* cases and which were unanimously rejected by this court at that time.

For example, the Solicitor General again argues as he did in the *Pfaff* and *Seaborn* cases, i. e., that in applying the Revenue Act and imposing Federal taxes uni-

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[3]—(Continued.)
eral Estate Tax Act to community partnership property of spouses residing in the State of California. The Treasury Department decision recited that it was confined to the application of the estate tax and that the impact of income taxes was left open for review by the courts. The decision was accompanied by an opinion of Hon. Harlan Stone, Attorney General, dated October 9, 1924, which precluded any further court tests of the application of the Federal Estate Tax to community estates of citizens residing in California, particularly in view of the opinion of the Ninth Circuit Court of Appeals in the case of *Wardell vs. Blum*, 276 Fed. 226, in which *certiorari* had been denied by the Supreme Court of the United States. In this opinion the Attorney General recognized that there was doubt under the California decision as to whether the wife had a vested interest in community property that would authorize her to return one-half of the commmunity income as her own while the spouses were alive. He held that there was no doubt as to the proper application of the Federal Estate tax law and the non-taxibility in the husband's estate of the wife's half interest in community property, saying:

> "If the widow takes by virtue of her ownership in community property which is held by the community subject only to the power of disposition of the husband, obviously the estate tax has no application. * * * a study of the true character of that interest as it existed in the Spanish Law and as it has been developed in the jurisprudence of the community property states, including California, affords no substantial basis

formly this Court is interested only in real and practical ownership and not in definitions of ownership announced by state courts in interpreting the local laws, and that this Court will look at realities and not technicalities. In the *Pfaff, Seaborn* and other community property test cases, the Court carefully considered the local law in the light of the Solicitor General's arguments in this connection and unanimously held that the wife's ownership in the community partnership property, as defined by the local law, was not a theoretical but a real ownership because of the practical attributes of ownership enjoyed by the wife and the substantial restrictions and limita-

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[3]—(Continued.)

for the hope that a renewal of the litigation on this subject in the Federal Courts would change the result."

The Attorney General in rendering his opinion promulgated Feb. 26, 1921, as Treasury Decision 3138, which dealt primarily with income taxes, discussed the Louisiana Statutes and decisions at some length and emphasized the fact that under the decisions the wife was not required to pay an inheritance tax on her one-half of the community estate, upon the death of her husband. The Attorney General also cited the decision by the Supreme Court of Idaho in the case of *Kohny vs. Dunbar*, (121 Pac., 544), and quoted therefrom as follows:

> "Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half interest therein by will, it is clear to us that if the wife must pay an inheritance tax on her half of the property upon the death of her husband, that the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate."

Similar expressions are contained in decisions by the courts of other community property states wherein it is universally held that only one-half of the community estate is subject to the State Inheritance Tax upon the death of one of the spouses. For instance, in *Jones vs. State*, 5 S.W. (2d) 973, the Texas Commission of Appeals in a decision approved by the Supreme Court of that state implied that a construction of the State Inheritance Tax which would subject the whole community estate to such a tax upon the death of one of the spouses would render the statute unconstitutional; and said:

> "To impose the tax under such circumstances would be to visit the tax upon the real owner whose real right to the property has not been affected one way or the other by the death of a co-owner."

See also *Hansen vs. Blackmon, Collector*, 169 S.W. (2d) 955 (Texas Court of Civil Appeals; 169 S.W. (2d) 962 (Supreme Court of Texas.)

tions placed on the husband's power and authority as a fiduciary and manager of the community partnership.

The Solicitor General in the *Pfaff, Seaborn* and other community property test cases, also argued, as he does here, that the husband's authority and powers as manager and agent for the community partnership were so great that as a practical matter this court should treat him as if he were the real owner. This Court again, after analyzing the local law and the rights of the wife and the limitations and restrictions on the husband's authoity, held unanimously that although there were some powers the husband had which managers of an ordinary limited partnership or trustees of a spendthrift trust did not have, the community partnership was so closely and substantially analogous to those common law legal relationships that the husband was both in theory and practical legal effect merely an agent.

Ignoring all of the practical attributes of the ownership of the wife and the substantial limitations on the husband's authority as manager or agent of the community partnership, the Solicitor General in the *Pfaff, Seaborn* and other cases, sought just as he seeks in his brief in this case, to emphasize characteristics of the community partnership law which, he claims, seem to weaken the wife's ownership and to enlarge the husband's authority as compared with usual common law legal relationships.

An apparent peculiarity of the community partnership law emphasized again by the Solicitor General in his attempt to discredit the reality of the wife's interest in the community partnership is that the wife's separate creditors cannot seize assets of the community partnership for the payment of her debts. Her creditors can

reach the wife's undivided interest in the partnership but not the specific, tangible assets of the community partnership. The exemption of the assets of the community partnership from direct seizure for her separate debts (not for proper and necessary community debts incurred by her) was to prevent by indirection dual control in the management of the community partnership. If the wife could incur separate debts and thereby, indirectly, subject the community partnership property to seizure, she could indirectly participate in the management of the community partnership and thus bring about all the evils and friction of dual management. It is clear, therefore, that the discretion vested in the husband by the Louisiana marital partnership law to manage and administer the community as agent would be a vain and useless thing if his control in management could be harassed and defeated by the exercise of similar powers by the wife. Moreover, under Louisiana law, every partnership is a separate entity and partnership property can never be seized by a partner's individual creditors; such creditors can seize only the partner's interest in the partnership. See *Toelke vs. Toelke*, 153 La. 697, 96 So. 536. The rule governing the rights of the wife's creditors in this regard is similar to that applied in Louisiana in all partnership cases. The application of this rule does not detract from, but on the contrary directly supports, the reality of the wife's present ownership in community partnership property.

A strong parallel to the wife's position in Louisiana is to be found in the common law decisions and statutory provisions of many states in connection with the regulation of "spendthrift trusts." Most of the states recognize "spendthrift trusts," and many of them have special statutes providing for the creation of "spend-

thrift trusts." See Ruling Case Law, "Trusts," Paragraphs 116 to 118. It is possible for property to be put in the hands of a trustee for the benefit of the *cestui que trust* or beneficial owner of the property, subject to the stipulated conditions that the beneficial owner cannot alienate or dispose of his beneficial interest, that the trust property shall not be subjected to attachments for the debts of the beneficial owner, and that the investment, administration and control of the property shall be entirely vested in the trustee. In such a trust the beneficial owner cannot control the management of the property, cannot decide how the property shall be spent, and cannot sell the property, nor can the property be subjected directly to his debts. A beneficial owner, under such circumstances, cannot interfere in any way with the control and administration of the trust so long as the trustee properly manages the property and is not guilty of fraud or a breach of trust.

No one would seriously contend that the **trustee** of a "spendthrift trust" is the **owner of the property** and that the property should be considered as belonging to him for tax purposes merely because of restrictions with reference to the beneficiary's control and administration of the property or its exemption from seizure for the beneficiary's debts; nor has it ever been suggested that the trustee under such circumstances, for tax purposes, should be considered in reality the owner because of his practical control. There is no more basis for the suggestion that, in Louisiana, the husband, as managing partner of the community partnership, is the owner because of his power of administration and that the wife has no property rights because of the exemption of the community property assets from direct seizure for her separate debts.

The Solicitor General in his brief in this case (p. 41) relies again, as he did in his brief in the *Pfaff* case and in the other community property test cases, on the analogy of the common law rights of **dower** and **courtesy.** This analogy was rejected by this Court in the *Pfaff*, *Seaborn* and other community property test cases. Indeed it had been presented to and rejected by this Court many years previously. See *Arnett vs. Reade*, *supra*, decided in 1911 where the Court after referring to this contention, speaking through the late Mr. Justice Holmes, said:

> "However, this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. * * * We should require more than a reference to *Randall vs. Krieger*, 23 Wall, 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States."

Again the discussion by the Solicitor General of the principle of "forced heirship" shows how wide of the mark he is forced to go for an analogy. In no system of jurisprudence has an heir an interest in the property of another before the latter's death. A forced heir is still only an heir, who possess no right not held by any other heir, except that the policy of the State forbids his disinheritance without cause in order to assure that the whim of the decedent may not reduce his inheritance below the fraction (legitime) fixed by law.

But never has a son been deemed to have even the shadow of right in the property of his living father. Not only does his right as heir originate at the time of, and because of, his father's death, but, even then, his legitime

cannot possibly be estimated until a liquidation of the estate determines whether donations *inter vivos* and *mortis causa* have infringed thereon. In brief, he is but an heir, acquires only by death and inheritance; but with the sanction of a law which entitles him, upon the happening only of the event of death, then to reduce such donations as would otherwise cause his whole or partial disinherision of that proportion of the estate which the state law of descent and distribution declares he should inherit.

The Solicitor General (Page 27-28 of his brief) suggests that prior to *Succession of Wiener*, the community partnership property was subject to the husband's separate debts. With due deference, this unqualified statement is misleading and not an accurate statement of the prior law of Louisiana. In fact, the Solicitor General, in another part of his brief, qualifies this statement. The Louisiana law makes clear that it is the duty of the husband, as manager of the community partnership, not to use any part of the community partnership property to pay his separate debts or to permit a seizure of any of the assets of the community partnership for his separate debts. Article 2403 of the Louisiana Civil Code provides that "debts contracted during the marriage enter into the partnership of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects". See also *Childers vs. Johnson*, 6 La. Ann. 634 at page 641, decided in 1851. The Solicitor General does not point out until later in his brief, and then not clearly or emphatically, that under the Louisiana law the husband is required to pay his separate debts out of his separate estate, and if he does use com-

munity partnership property in violation of his duty and the law to pay separate debts, or permits community partnership assets to be seized for his separate debts, he does so wrongfully and he must account for it and reimburse the wife, either out of his separate property or his one-half of the community partnership assets, for her half of the community partnership assets which have been improperly used. See *Glenn vs. Elam*, 3 La. Ann. 611 (1848); *Dillon vs. Freville*, 129 La. 1005 (1912), *Succession of Casey*, 130 La. 743 (1912), Louisiana Civil Code, Article 2403, *Childers vs. Johnson*, 6 La. Ann. 634, (1851).[3a]

The Solicitor General, in his brief, evidently for the purpose of attempting to discredit the extent of the various rights of the wife to a separation of property and a dissolution of the community partnership in Louisiana, criticizes the decisions of the Louisiana Supreme Court in the case of *Davock vs. Darcy*, 6 Robinson 342, decided in 1844, over one hundred years ago. In this case the Court construed Article 2425 of the Civil Code as not restricting the wife's right to a separation of property to cases where her dowry was involved or she had separate claims. Whether this decision in 1844 was a proper, socially

[3a]In *Glenn vs. Elam*, 3 La. Ann. 611 (1848), it was held that even if the monies used by the husband to pay his separate debts are revenues from his separate estate (which under the law of Louisiana fall into the community), he becomes indebted to the community for the amount of such revenue so used and must reimburse the community therefor, the Court saying at page 615:

> "It has been contended that the Gillespie community is not entitled to recompense for the debts of the husband, paid by him during the community, out of revenues arising from his separate estate. If the revenues of the estate of the husband formed a part of the community, and we do not understand this to be questioned, their origin does not affect the right of the community to exact remuneration for the payment of debts to which they have been applied."

In *Dillon vs. Freville*, 129 La. 1005 (1912), it was held that if the husband exchanges separately owned immovable property for other like property with money "to boot", he and his estate become indebted to the community for the amount of the money in the absence of proof that the money was his separate property.

justifiable and forward-looking interpretation of the article of the Code in the practical evolution of the Louisiana community partnership law for the protection of the wife's interest and ownership in one-half of the community partnership property, which we think it was, or amounted to judicial legislation, as the Solicitor General, evidently relying on Professor Daggett's writings, seems to suggest, is immaterial for the purposes of this case. The decision in *Davock vs. Darcy*, broadening the interpretation and application of Article 2425 of the Civil Code, has been consistently followed and applied in numerous decisions and is now the settled law of the state.[3b] Again evidently relying on Mrs. Daggett's writings in 1931 and prior years, the Solicitor General attempts to restrict rigidly the interpretation of Article 2425 and the earlier Louisiana decisions on separation of property, interpreting and applying Article 2425 to the actual facts involved in each case and to a strict and literal interpretation of his idea of the meaning of the earlier decisions, and he complains that the Supreme Court of Louisiana has recently given a much broader interpretation of and meaning to Article 2425 of the Code and to the earlier cases than their facts and language justify. The strict and limited interpretation of the earlier cases suggested by the Solicitor General completely ignores the reasoning and theory of the cases and the underlying philosophy and development of the Louisiana jurisprudence. It also ignores the reasoning and underlying philosophy of the Supreme Court of Louisiana in constantly enlarging and giving a more liberal inter-

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[3b] *Jones v. Morgan*, 6 La. Ann. 630; *Wolfe & Clark v. Lowry*, 10 La. Ann. 272; *Mock v. Kennedy*, 11 La. Ann. 525; *Webb v. Bell*, 24 La. Ann. 75; *Vickers v. Block*, 31 La. Ann. 672; *Chaffe v. Watts*, 37 La. Ann. 324; *Brown v Smyth*, 40 La. Ann. 325; *Walmsley v. Theus*, 170 La. 417; *Gastauer v. Gastauer*, 131 La. 1; *Carite v. Trotot*, 105 U.S. 751; *Jones v. Jones*, 119 La. 677; *Hill v. Hill*, 115 La. 489; *White v. White*, 159 La. 1065.

pretation and application to Article 2425 and to the earlier Louisiana cases.[3c]

In defining and appraising the meaning of both negligent and fraudulent mismanagement, the Louisiana Supreme Court necessarily and properly interpreted the words "mismanagement" and "fraud," as used in our codal articles, as they are ordinarily interpreted in application to the obligations and duties of agents, managing partners and other fiduciaries in common law states. The Louisiana Supreme Court in *Succession of Wiener, supra*, did not enlarge, but merely summarized and restated the principles and philosophy of the Louisiana codal articles and the rules established by the jurisprudence of the state when it said:

> "It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital relationship, the framers of our law and its codifiers saw fit, in their wisdom, to place the husband at the head of the partnership, but this did not in any way affect the status of the property or the wife's ownership of her half thereof. * * * The community partnership had to be placed in charge of a managing partner for very expeditious and necessary reasons — dealings with third parties with respect to the community property had to be protected from the nullifying

[3c]The language of Article 2425 of the Civil Code would seem plainly to give the wife the right to the separation whenever the mismanagement of the husband, or the disorder of his affairs, justifies the belief that "her rights" may be endangered. Those rights manifestly include her interest in the community. It is of interest to note that the Louisiana jurisprudence, which the Solicitor General says broadens the language of the Code, is no different from the doctrine in France under a codal article identical in terms. See authorities cited in *Davock v. Darcy*, 6 Rob. (La.) at page 345. *Marcade*, one of the most highly respected of the French Commentators on the Code Napoleon, says, in his comment on Article 1443 of that Code, which corresponds to Article 2425 of the Louisiana Code, that the wife has the right to separation even if she has brought nothing into the marriage, or even where she is not capable of earnings, because she always has an interest in the conservation of her half of whatever community is left after her husband's dissipation. Other commentators are to the same effect.

actions of the other spouse; the confusion ensuing from dual control had to be avoided. And the husband was made the managing partner of the community and charged with the administration of its effects, as well as with the alienation of its effects and revenues by onerous title, because he was deemed the best qualified to act.

"But the redactors of our law did not neglect to hedge the wife's interest in the community property with protecting rights. They subjected the husband's powers to various substantial checks and limitations corresponding to those imposed upon any managing partner or agent and provided for the wife's right to assert such limitations. * * * The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive managment and control of her half of the community partnership whenever her husband proves to be incompetent, a bad manager, of a reckless or speculative disposition, or whenever his affairs are in such disorder that her property rights are jeopardized."

But in any event this Court is bound by the later repeated decisions of the Supreme Court of Louisiana on this point of Louisiana law.

In order not to lengthen unduly our main brief and in order to prevent any confusion with regard to the present status of the extent of the wife's rights in connection with a separation of property and a dissolution of the community partnership, we have prepared as Appendix B (pp. 16-23), an exhaustive discussion of the Louisiana cases interpreting Article 2425 and the history of the development of the Louisiana jurisprudence with regard to the wife's rights in this connection.

We agree entirely with the logic and soundness of the interpretation of the Supreme Court of Louisiana as to the meaning of its previous decisions. However, regardless of our views or those of the Solicitor General, it is certainly immaterial and irrevelant in this case to debate whether the Solicitor General or law writers have correctly interpreted certain former decisions of the Supreme Court of Louisiana when, subsequent to the expression of this opinion by the law writers, decisions of the Louisiana Supreme Court have interpreted in a different way the meaning and application of the articles of the Louisiana Code and of the Court's previous decisions. That the husband is an agent and managing partner with substantially the same authority, obligations and duties of an agent or managing partner in common law states is now settled in Louisiana by the Supreme Court of the state. We understand that the Solicitor General admits this to be settled law and policy under our dual form of government. We would not have felt it necessary to make this explanation but for the fact that the Solicitor General in his brief quotes from Professor Daggett's articles and analyzes some of the earlier Louisiana decisions along the same lines discussed by Mrs. Daggett in articles which were written before the Louisiana Supreme Court effectively and, as we thought, finally settled the issue.

The Solicitor General states (his brief page 23) that the husband "administers it (community partnership) as he pleases and may expend the funds to gratify any personal desire without liability to account to the wife for his administration." He cites *McCaffery vs. Benson*, 40 La. Ann. 10, and *Frierson vs. Frierson*, 164 La. 687, in support of this statement. This unqualified statement is certainly not the law of Louisiana. The two

cases cited must be read in the light of other Louisiana cases and the articles of the Louisiana Civil Code to which we have referred in our brief. (See pages 12 to 20). The limitations and restrictions of the husband as managing partner, contained in our summary, demonstrate that it is not true that the husband may "gratify any personal desire without liability" to his wife. It is true that because of the intimate relationship between husband and wife, the husband, as manager of the community partnership, is presumed to act in good faith and to administer the assets and revenues of the community partnership as a good agent and for the benefit of the community partnership and in the interest of his wife and of the family. **It is not expected that a set of books be kept by the husband itemizing the income and expenditures during a long married life** or that the husband must be prepared, when the partnership is dissolved, to show affirmatively all of the details of the acquisition and management of the assets and revenues of the partnership. In this sense the husband is not required to make a detailed accounting as an ordinary managing partner of a commercial partnership. On the other hand, the husband is accountable and must reimburse the wife, if it is shown that he has given away community partnership property, grossly mismanaged the community partnership with resulting unjustifiable losses, used community partnership assets to pay his separate debts or to improve his separate property, or disposed of such property in dissipation and in fraud of his wife's rights as a partner. (See La. Civil Code, Art. 2404 and authorities cited, pages 12 to 20, *supra.*)

In the *Benson* and *Frierson* cases, it will be noted that there was no allegation or claim by the wife that the husband had concealed community partnership prop-

erty or had mismanaged the community partnership property or had disposed of any of this property in violation of his duty as managing partner. He was not compelled to submit a detailed accounting in the sense of showing affirmatively by the records and books, particulars of the history of his handling of the community partnership assets and revenues. But he was and would have been held accountable in the cited cases upon allegation and proof that he had violated his duties as agent and managing partner of the community partnership, and the Louisiana Supreme Court plainly indicated this by stating that no such allegations were made or suggested.

We do not understand the significance or relevance of the statement in the Solicitors General's brief that the husband in Louisiana is personally liable for community partnership debts. It is settled law in Louisiana and most of the common law states that a managing partner of a limited partnership or a commercial partnership is personally liable for partnership debts. Moreover, his interest in the partnership can be subjected to the payment of his separate debts.

When one stops to consider the intimate, delicate and sacred relationship of husband and wife and the psychological necessities for the peaceful and happy realization of the relationship, and at the same time recognizes that the framers of the historic Civil Law codes have woven into the marital status a practical commercial partnership, it is astonishing that the dictates of public policy and adaptive legal philosophy, in reconciling and harmonizing the two legal relationships, have resulted in modifying and restricting ordinary commercial partnership principles so very little.

It is always confusing to attempt to isolate and mathematically measure attributes of ownership. The Solicitor General admits that the legal and practical attributes and characterictics of ownership under local law vary in the different states, and vary with regard to the same type of legal relationships in different states.

Stripped of all subtleties of reasoning, critical observations and isolated and remote arguments by analogy, the Solicitor General's position, in substance, is that since the husband is managing partner or agent of the community partnership, and the management and business control is thus taken away from the wife with reregard to her undivided half ownership of the community partnership property, the husband should be treated for tax purposes as the real, complete and beneficial owner of all of the community partnership property, including the wife's half, and the wife's half should be completely ignored, and from the standpoint of ownership is not entitled to protection under the Constitution.

The simple answer to this contention is that during the long history of the development of the English and American common law systems, our courts have always consistently and universally recognized ownership of property as being substantial and real and as being entitled to protection under the constitution, even though the management and control of the property has been separated and vested in other individuals or corporations. We need only refer again to a few elementary and familiar examples, such as spendthrift trustees and their beneficiaries, managing partners and limited, special or silent partners,[34] guardian and ward, and curator and interdict.

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[34]A limited or silent partner is called a "partner in commendam" in Louisiana. See Articles 2839, 2844, 2849 of the Louisiana Revised Civil Code.

In the light of the practical and substantial nature of the wife's ownership and restrictions on the husband as agent and managing partner of the community partnership which we have previously outlined (*supra* pp. 12 to 20), we submit that the Solicitor General is asking, in effect, that the wife's undivided half ownership in the community partnership be treated as belonging to the husband and as taxable to him when, as a matter of fact, he cannot give it away if he chooses;—when he cannot dispose of it in fraud of his wife's property rights, if he pleases;—when, if he is reckless, careless, or a bad manager, he loses its administration; when, if he is of a speculative disposition, or the disorder of his affairs is such as to jeopardize his wife's property rights, he loses its administration;—when he is accountable for and must reimburse the wife for any losses she sustains because of his mismanagement or fraud;—when he loses its administration in case of a divorce even if without any fault on his part, his wife is unfaithful to her marital obiigation;—when he cannot spend it to improve his separate property, if he wants to;— when he cannot use it to pay his separate debts, if he pleases;—when he cannot dispose of it by will, if he chooses;—when he has no right or power to have it descend to his heirs;—when, if his wife dies, he loses its administration and must deliver it to his wife's legatees or heirs even though these heirs may be illegitimate children of another man;—and when, if it is willed to him by his wife, he takes it not as owner, but only by inheritance, and is compelled to pay both a state inheritance tax and a federal estate tax for the privilege of receiving it.

None of these restrictions and limitations on the power of the husband with regard to property and income acquired by his efforts during marriage exists in

common law states, where the husband is the owner of all of such property and income, and, conversely, the restrictions and limitations we have outlined exist in Louisiana, because the wife is the owner of one-half of the property and income acquired during marriage by the marital partnership composed of both husband and wife.

We have emphasized the fundamental and practical features of the Louisiana community partnership law, in order to show clearly that the community partnership between husband and wife in Louisiana and other community property states is not a theory, but is, in substance, a partnership imposed by law, which creates burdens and limitations as well as privileges in relation to the property rights of husbands and wives. These burdens and limitations on property rights are unknown in the common law states. If it were true that any so-called tax benefits flowed from the community partnership law, the circumstances would be logically immaterial, but as a matter of fact they are more than counterbalanced by the multitude of burdens and restrictions placed upon the property rights of husbands and wives in Louisiana, which do not exist in any common law state.

SOURCES OF COMMUNITY PARTNERSHIP PROPERTY

Mr. Wiener died testate, leaving his entire estate to his three children, who are the appellees here. Such "entire estate," under the local law, consisted of his undivided one-half interest in the community partnership property. That was all that he could dispose of, or that his legatees could receive; this because all that Mr. Wiener owned under the local law — and hence all that he could dispose of — was his interest in the community

partnership, namely, an undivided one-half interest in the partnership estate. The record reveals only that Mr. Weiner was married in 1907, and, that the property used to measure the tax here involved consisted of all of the community partnership property (except a small amount of real estate in Mississippi) acquired during the existence of the marriage which his death terminated, all of which at the time of his death was owned by him and his wife as partners in the community partnership. It is necessary, therefore, to resort to the local Louisiana statutory definition of "community partnership property" to determine from what sources this property could have been acquired.

In Louisiana, all property found in the possession of either spouse, upon dissolution of the marriage, is presumed to be community partnership property and acquired during the existence of the marriage, unless it can be clearly identified as belonging to the separate estate of one or the other. (Louisiana Civil Code, Art. 2405, Ap. 11 *infra.*) The separate estate of either spouse is (in addition to some unimportant items) that property which that spouse owned at the time of the marriage or thereafter acquired by gift, devise, or inheritance. Revenues from separate property, as a general rule, fall into the community partnership (La. Civil Code, Arts. 2402, 2399, 2406, 2404, 2385, 2386, Appendix pp. 11, 12 and 13, *infra.*) Property once separate can lose that separate character and become community property through commingling and a failure of positive proof identifying it as separate property; the community partnership is the favored estate and everything not identifiable and clearly traceable as separate property falls therein, regardless of its method of acquisition.

Therefore the community partnership property used

to measure the tax can in any case come from no other than one, or more, or all, of the following sources:

(a) Savings from compensation received for the husband's personal services;

(b) Savings from compensation received for the wife's personal services;

(c) Savings from revenues of the wife's separate estate;

(d) Savings from revenues of the husband's separate estate;

(e) Profits from gainful occupation where neither spouse nor minor children received compensation for services actually rendered, such as farming, ranching, merchandising, joint enterprises, manufacturing, etc.;

(f) Property purchased during marriage on credit or with borrowed funds;

(g) Property acquired with commingled or unidentified property or with joint funds;

(h) Miscellaneous sources, as, for example, property acquired with savings from compensation received for the personal services of minor children, or property acquired by adverse possession, and similar acquisitions;

(i) Profits and savings from reinvestment of property or funds received from sources (a) to (h) inclusive.

The parties here were married for some thirty-four years (R. 7, 8). Never, before the amendment of 1942 now in question, had there been any necessity or requirement that the husband and wife keep books or records

showing the source of funds used to acquire community property and the investment, from time to time, of the revenues of community partnership property. Therefore, in the generality of cases, and undoubtedly, in this case, it is impossible, upon the death of the spouse most familiar with the business transactions, for his executor or legatee to trace the transactions of a long married life and determine through many mutations and changes the origin of each particular community asset on hand at death or whether any particular community partnership property or asset was acquired through reinvestment of moneys or property obtained from separate property or from the earnings of either spouse or from community partnership property not so traceable. Yet this is a burden which the 1942 amendments undertake to impose.

THE 1942 AMENDMENTS

The Revenue Act of 1942 attempts to establish a new and revolutionary method of taxing community partnership property at death. That Act abandons, as to community partnership property, and as to community partnership property alone, the test of ownership at death, as the controlling factor in measuring the tax. It purports to substitute therefor, as to community partnership property, and as to community partnership property alone, varying uncertain capricious, arbitrary and confiscatory tests, some applicable in one case, some in another.

Section 402 (b) (2)[4] requires that the entire interest of both spouses in all community partnership property be included in the gross estate of the first spouse to die, with two exceptions only: (1), property received as or derived from compensation for personal services actually

[4]See page 2, *supra*.

rendered by the surviving spouse; and (2), property derived originally from the separate property of the surviving spouse.[5] Even as to these items of community partnership property, a minimum of one-half must be included in the decedent's estate, because of his or her power of testamentary disposition over one-half of all community partnership property.

In the teeth of the state law providing for the equality of ownership of the spouses in community partnership earnings and acquisitions, the statute by pure legislative fiat arbitrarily creates three categories of community partnership property for federal estate tax purposes.

(1) The first category includes community partnership properties traceable to the husband's earnings or to income from his separate property. If the husband dies first, all of such community partnership properties must be included in his estate, but if the wife should die first, one-half of these properties is includible in her estate;

(2) The second category includes community properties directly traceable to the wife's separate earnings or to income from separate property. If she dies first, all of such community partnership properties fall into her taxable estate; but if her husband predeceases her, one-half of such properties is included in and taxed to his estate.

(3) The third and most important category, since it usually comprehends the bulk of community partnership property, consists of all properties not directly

[5]As the Committee Report on the Bill shows, the excepted items include "(1) property acquired in exchange for separate property, (2) community income yielded by such property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property." S. Rep. No. 1631, p. 231.

traceable to the earnings or income from the separate property of either spouse.[6] As to the community property falling into this category, the full value is included in the estate of the first spouse to die. If the husband dies first, both halves are included in his "gross estate"; if the wife dies first, both halves are included in her "gross estate".

It is to be noted in the first place that in the creation of the three categories of community partnership property we have described, the amendment abandons and disregards the established constitutional rules of estate taxation, and arbitrarily disregards the constitutional right of each state under the Tenth Amendment to determine the ownership of property. It abrogates the local law and by legislative fiat sets up at least **three,** and according to the Government's contention, **four,** different rules of taxation to be applied, depending upon the circumstances of the particular case.

1. The statute selects ownership or the power of testamentary disposition as the taxable event in certain cases. We may term this the "minimum rule" of taxation under the statute. A decedent, husband or wife, is always taxed under the statute on all property which he or she owned, that is to say, over which he or she had a testamentary power of disposition. But ownership is not made the sole criterion or test of taxation, except when it is profitable to the government to apply it. A decedent in Louisiana, more often than not, under this statute will be taxed on property which he or she did not own and over which he or she had no power of testamentary disposition. For example, the surviving husband or wife does not own, and has no power of testamentary disposition over, the share of the community property traceable

[6] See pp. 37 to 39, *supra*.

to the decedent's separate earnings or separate property, and yet the decedent's estate is taxable on this property although he or she did not own half of it and did not have the testamentary disposition of half of it. This is so because both earnings of each spouse and income from separate property are—except in rare and special instances—community partnership property. As such, the power of testamentary disposition is, of course, limited as to each spouse to an undivided one-half. And, yet, the decedent's estate is taxable, not for the part owned nor yet for that part testamentarily disposable, but for the whole. Moreover, in the third category of community property which we have already referred to, where the community property was accumulated by husband and wife in a joint enterprise operating a farm or a husband and wife operating a store or other business, or where the community property was accumulated as a result of borrowing money, that is, incurring a community debt, the community partnership property is not traceable to or derived from the "personal services" or the separate property of either spouse, and yet all of this property is taxed in the estate of the decedent, husband or wife, depending upon the accident of whichever one dies first.

2. The Committee's report indicates that the theory of the statute is to tax the spouse who created the estate, or, as it states, to tax the spouse to whom the property is "economically attributable". This second test or basis for the tax—to tax the person to whom the property is "economically attributable"—is not, however, the sole criterion. It is only applicable under the statute when it result in **increasing** the amount of the tax. For example, when the community partnership property is directly traceable to the decedent's separate earnings or to his or her separate property, and he or she dies first, the whole

of the community partnership property is taxed to him or her. However, if the non-producing spouse dies first, the test as to who created the estate or as to whom it is "economically attributable" is abandoned, because if this test and rule is consistently applied there would be no tax in the event of the prior death of the non-producing spouse. The statute undertakes to avoid this result by providing that in such a situation, when the so called non-producing spouse is the decedent, the test of ownership or power of testamentary disposition shall apply, and the decedent's estate shall be taxed on at least one-half of the community partnership property. Moreover, we should point out again that if the community partnership property is not traceable to the compensation for personal services or separate property of either spouse and consists of property derived from their joint efforts in a farming or merchandising business or from community loans, the test of taxing the decedent who created the estate is again abandoned and the tax is laid on the whole estate without regard to who produced it, who owned it, or who had the testamentary power of disposition over it.

3. The third situation in which taxes are imposed by the statute cannot be explained on either of the two theories we have just discussed, namely either the theory of ownership or the theory of taxing the spouse who created the estate or to whom it was "economically attributable". The third situation involves community partnership property of the category we have already described when the husband and wife, as partners, accumulate community partnership property not for "personal services" but as a result of farming, merchandising or any other business in which they both participate, or accumulate such property as a result of the successful investment of the borrowed money, i. e., community partnership debts. In

this situation, the first spouse to die is taxed on the whole, including the survivor's one half share, even though the decedent had no ownership over the other half or testamentary disposition over it, and even though the decedent was not the creator of the estate. We are left to conjecture as to the reason or excuse for the tax in such a case. Apparently, under such circumstances each spouse is presumed, in the teeth of both the law and the facts, to own outright the entire property and whoever dies first is taxed on all of it.

4. Although the Government contends that cessation of management is the test of taxability under the 1942 Statute, the statute, neither in its terms nor its operative effect, is directed at cessation of management. As a matter of fact, as it will hereafter be shown (pp. 65 *et seq.*) in about half the cases where the wife dies first there is no cessation of management and this test is not applicable to support the statute. When the wife dies first the husband continues to manage his half of the community partnership property and actually loses his management of his wife's half of the community partnership property. It will also hereafter be shown (pp. 57 *et seq.*) that where the husband dies first the termination of his agency or management is not a property right and does not involve a shifting of economic benefits or valuable rights which can be considered property rights in the sense that the cessation of such an agency can, consistently with the Constitution, serve as the basis or excuse for an estate tax. Even if it is assumed, however, for the purpose of argument that the cessation of management could possibly justify the tax under the Constitution when the husband dies first, this theory completely fails to explain or justify the tax in the other half of the cases where the wife dies first. The statute is not severable. Under such circumstances there is no

theory or constitutional justification whatever supporting the validity of the statute which requires the husband's half of the community partnership property always to be added to the wife's half of the community partnership property for the purpose of calculating and imposing the graduated federal estate tax on her estate.[7]

In the light of the foregoing summary, it is apparent that the statute represents a curious, inconsistent and arbitrary intermixture of tests involving recognition of State law at times and complete disregard for State law at other times. It adopts one test for tax purposes under one set of circumstances and another test under a different set of circumstances, none of which have any rational or logical relationship or basis as an excuse for estate taxation. The law of the state is recognized in determining the minimum taxable estate by the provision requiring inclusion of all property over which decedent possessed the power of testamentary disposition. The law of the state is entirely disregarded in determining the maximum taxable estate by the provision requiring inclusion of the portion of the community partnership property always belonging to the surviving spouse.

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[7]The statute does not expressly make the cessation of management the excuse for the tax, and, in its operative effect, the statute does not lay the tax on the termination of management. In the case of the wife's prior death, the testamentary power of disposition is selected as the subject for the tax, even though the husband is the manager of her interest in the property. Should she die first, the fact that she or her property originated his wealth and not the fact that her husband at that time was manager, is made the occasion for the tax. But were the husband to die first, even though death terminate his management over all community partnership property, including such portion thereof as might be property traceable to his wife's separate earnings or separate property, the statute would tax the husband's estate only on one-half of the property so traceable. Thus, the source of the property in such an instance becomes more important for estate tax purposes than cessation of management. Moreover, cessation of management is utterly disregarded in cases where the wife dies first and her estate is taxed on the whole property as in category 3 above. Cessation of management is not considered where the management of the property is in the wife; as, for example, where, on a showing of lunacy or abandonment by the husband, the wife takes over administration of the entire estate.

The effect of this statute, then, is: to disregard property rights; to tax one taxpayer with respect to the property of another; to tax him on property which he never owned, which he could not give away, could not and did not transfer at death and which he could never convert into his own separate property. It treats (that is, conclusively presumes) two separate persons as owning the same property at the same time. It makes the tax depend on the sheer accident of which of the two spouses may happen to die first.

For example, the storekeeper and his wife are both regarded as owning at the same time the entire business, including the interest of the other, and the first to die is taxed on the whole. A farmer and his wife are each considered as owning the whole of their lifetime savings and the first to die is taxed on the whole. A man or his wife may purchase securities on credit for their common benefit and pay off the debt with the income therefrom; yet each is considered as owning the whole and the first to die is taxed on the whole. In fact the bulk of all property in the community property states will be taxed to the first spouse to die, because most community partnership property is not derived from compensation for "personal services" or separate property of either spouse (see pp. 37-38, *supra.*) and that which is so derived usually cannot be traced to such source.

This resume sustains the charge that the amended law applies varying, capricious, arbitrary and confiscatory tests to measure the estate tax laid upon community partnership estates—and upon such estates alone. Other considerations reinforce this conclusion.

The Community Property Amendment, if upheld, will completely confiscate many estates and frequently will

deprive a man, after a lifetime of labor, of the right or opportunity to leave anything whatsoever to his children or legatees. This can result because there is no statutory provision authorizing the decedent's executors to surcharge the surviving spouse's share of the property with any portion of the decedent's tax, comparable to the specific provision (Section 826 (c)), Internal Revenue Code, App. page 10, authorizing the executors to collect from insurance beneficiaries.[8]

The arbitrary and confiscatory character of the 1942 Community Property Amendment is further illustrated and emphasized by the fact that only one-half of community partnership debts can be deducted in calculating the decedent's tax. This is so because no change was made in the provision allowing deductions of claims against the estate, in determining the taxable estate. Only

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[8]For example, if a spouse dies possessed of a one-half interest in a net community estate of $6,000,000.00 in value, and there are no deductions which can be proved as traceable to separate services or property, the estate tax deductible for his one-half interest, but measured by the whole, would be $3,138,200.00, or $138,200.00 more than his entire estate of $3,000,000.00. This would mean that the husband or wife, as the case may be, would have nothing whatever to leave to their children or legatees. This would result because the Revenue Act, although imposing a lien on the survivor's half of the community for the payment of the tax and making the survivor personally liable, (Section 411 (b) Internal Revenue Code, App. pg. 6) also gives the survivor a right of reimbursement for any taxes collected for the payment of the decedent's tax. (Section 826 (b) Internal Revenue Code App. pg. 10.) Even if the provisions of the Revenue Act could be construed as requiring a proportionate contribution between the decedent's estate and the survivor's estate for the payment of the tax, the effect of the Community Property Amendment would be to impose upon the decedent an unfair and much heavier tax and penalty because of the adding of the survivor's shade to the decedent's share of the community in calculating the tax, on account of the graduated estate tax rates. For example, even if the estate tax laws could be so construed as to make each spouse pay a proportionate share, in the example we have given of a $6,000,000.00 estate, the total tax of $3,138,200.00 would be divided between the decedent's estate and the survivor's estate, and each would pay $1,569,100.00. If only the $3,000,000.00 estate of the decedent were subject to the estate tax and the $3,000,000.00 belonging to the survivor was not added to measure the tax, the tax would be $1,263,200.00, or approximately $300,000.00 less. In other words, $300,000.00 would be an arbitrary penalty imposed on the decedent by reason of including property belonging to the survivor in calculating the decedent's tax.

the decedent's debts, that is, one-half of the community debts, are deductible. See Section 812 (b), (Internal Revenue Code, Appendix, pages 8-9). Not only is this grossly unjust, but its operation will materially increase the number of estates entirely confiscated by the tax.[9]

Another arbitrary, capricious and unfair result of the amendment of 1942, when applied to the Revenue Law, is that different rules of income taxation applicable to sales of community partnership property after death than are applicable to similar property in other states will result.[10]

If community property is given away, the husband may be treated as the owner of the property, and may

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[9]In fact, under some circumstances, the statute would require a tax to be paid by an estate which would owe no tax but for the situation presented by the statute. Given the normal Louisiana case, the only property belonging to a husband and wife is the respective half interest of each in the community partnership which exists between them. Suppose a community has assets worth \$300,000.00 but owes debts amounting to \$350,000.00. The community is, therefore, clearly insolvent yet, on the death of the spouse dying first the total community property, \$300,000.00, would be considered as the base. From this would be deducted only one-half of the debts, to-wit \$175,000.00, leaving \$125,000.00. From this would be deducted the \$60,000.00 statutory exemption. On the remainder, to-wit, \$65,000.00, estate taxes would have to be paid. Thus, estate taxes would have to be paid though in law and in fact the entire estate belonging to the deceased was consumed by debts and the deceased left no net estate whatever.

[10]For example, if community partnership property is sold after the death of one of the spouses, the basis for determining the gain or loss is the value at the date of death of the decedent's one-half interest and the original cost of the survivor's one-half interest. (See Section 113 (a) (5), Internal Revenue Code, Appendix pages 10-11). The result, if the 1942 amendment is upheld, is that, if community partnership property which has enhanced in value after its acquisition is sold after the death of one of the spouses, the surviving spouse is liable for income taxes on the profit resulting from the disposition of the survivor's one-half interest, despite the fact that under the 1942 amendment the decedent's estate has been required to pay an estate tax on the entire property at the value at which it was sold, that being the value at the date of death of the spouse first dying. The rule in other states is that property sold after death carries, as its basis for gain or loss, the fair market value at the decedent's death. Only in community states is the basis for one-half of the property fixed by original cost. This difference in treatment is logical and correct when the survivor's property is not taxed in the estate of the dying spouse. But it becomes arbitrary and confiscatory under the operation of the estate tax provisions of the 1942 amendments.

be required to pay a gift tax on the whole community, even though the "gift" to the extent of one-half be to the wife of her own property, and even though, shortly before she may have paid income taxes on the same property.[11] Thus, the husband may be regarded as the owner, and required to pay a gift tax if a gift is made during his lifetime (Sec. 453); yet, if no gift is made and the wife dies, she is regarded as the owner, and her estate must pay estate taxes on the same property, always on one-half, and, more often than not, on the whole, (Sec. 402 (b) (2)). The arbitrary federal presumption created by this statute in contradiction of the state law determining ownership and, also the difficulty, and in most cases the impossibility, of doing the tracing which the act purports to permit will usually accomplish this unlawful and unjust result.[11a]

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[11] Under Section 453 of the Act of 1942, Appendix page 6, *infra*, all gifts of community property are charged to the husband, unless the poperty is directly traceable to the wife's compensation for "personal services" or separate property, an impossibility in most cases. If a gift is made of community partnership property in contemplation of death, the husband is regarded as the owner of all the property for gift tax puposes, and must pay the gift tax on all (Section 453). Yet if the wife dies, she is deemed to have made the gift and must pay the estate tax, not on half of the property, but on the whole, in most instances. (See Section 402, Revenue Act of 1942, page Ap. 1 *infra.*) Similarly, if community partnership property is given away, the husband retaining a life income, he is treated as owner of the whole, and pays the gift tax (Section 453). But at his wife's death, she is deemed to have made the gift and her estate bears the tax on the whole. In neither case is the gift tax paid by the husband available as a credit against the wife's later estate tax. (See Section 183 Internal Revenue Code.) It is only in the community partnership property states that this credit is denied.

[11a] In line with the policy of the Treasury Department ignoring the local community partnership law, the regulations interpreting the 1942 Community Property Estate and Gift Tax Amendments provide that in the event of a dissolution of the community partnership by the husband and wife a gift tax must be paid by the husband on the one-half of the property delivered to the wife in connection with the liquidation of the community partnership although it is her property under the local law, because the statute conclusively presumes that the property received by the wife is the property of the husband unless shown to have been received as compensation for personal services by the wife or derived from her separate property. The interpretation of the 1942 community property gift tax amendment is announced in *Regulation* 108, *Section* 86.2 of the *Federal Gift Tax Act* which provides: "the rule . . . applies

When life insurance forms all or part of the taxable estate, there is a veritable maze of confiscatory and capricious treatment under both the gift and estate tax laws. Laws of property and laws of insurance are utterly disregarded, and the self-contradictory theory of dual ownership is applied.[12]

Where the community partnership is dissolved by a separation of property under the Louisiana law, with-

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11a—(Continued)
alike to a transfer by way of gift of community property to a third party, or third parties, to a division of such community property between husband and wife into the separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property of either of the husband or of the wife. . . ."

It follows from the above ruling that a gift tax will be imposed if the community partnership is dissolved by voluntary agreement as is permitted in the State of Washington. A voluntary dissolution is not permitted by the law of Louisiana. In Louisiana, however, where the dissolution can only be brought about as a result of a Court decree in the case of (1) separation of property from mismanagement, fraud or some other cause, (2) a separation from bed and board, and (3) a divorce, apparently a gift tax would be nevertheless imposed, although the dissolution and liquidation of the community partnership was compelled by judgment of the Louisiana Court pursuant to mandatory statutory provisions and the judgment itself was based on the judicial recognition of the previously existing one-half ownership of each spouse in the community partnership assets.

[12]If, for example, the wife owns as her separate property a policy of life insurance on her husband's life and premiums are paid thereon out of partnership community funds, the husband must pay gift taxes on the entire amount of premium payments, since community funds are used to enhance the value of the separately owned property, even though the "gift" is, as to one-half, a "gift" to the wife of her own funds, and even though she may have paid an income tax on the same funds a few days previously. Yet, after having made the gift, the husband's estate, at his death, must pay an estate tax on the full proceeds of the policy owned by the wife and paid for in half by the wife's funds, on which the husband has paid gift taxes. Previously, insurance proceeds were included only to the extent that the decedent paid premiums on the policy so that, in the community partnership property states, only one-half of the insurance was taxable where the premiums were paid with community partnership funds. (*Lang v. Commissioner*, 304 U.S. 264; *Howard v. United States*, 125 Fed. (2d) 986.) But under Section 404 of the 1942 Act, page Ap. 2, *infra*, premiums paid with community partnership funds are considered to have been paid by the insured, unless, again, such funds are traceable to the compensation for "personal service" or separate property of the survivor. Similarly, if a husband in a community partnership state takes out a policy on his wife's life in his own favor, and pays the premiums from community partnership funds, her estate must pay tax upon the full policy proceeds, even though the policy is owned by the husband, and he pays for half of the cost.

out a divorce, for mismanagement, or where the marriage is dissolved by divorce, the tax is levied as it would have been prior to the 1942 amendment. If death occurs one moment after separation or divorce, only one-half of the property is taxed to the decedent. If death occurs one moment prior to separation or divorce, the whole may be taxed to the first to die.[13] This is perhaps the first time in history that a statute encouraging divorce or separation of partnership property has been passed.[14]

Where the spouses move to a non-community property state, and there invest the community partnership property brought with them, the law, upon the death of either, will regard the first to die as a tenant in common owning only one-half of the property, and limit the tax accordingly, whereas, if they remain in the community partnership property state, the whole will generally be taxed to the first to die. Thus one rule of taxation is applied in community partnership property states, and another rule, respecting the **same spouses** and the **same property,** is applied in the other states.

For example, the law of a new domicile will not apply the community partnership system as to property acquired after change of domicile, but it will recognize that the property previously acquired in Louisiana, or some other community partnership property

[13]Section 402 (b) (2) applies only to property held as community property. After separation or divorce, even if there is no partition in kind, the property is held as tenants in common and not as community partnership property.

[14]The temptations to wealthy person to separate or divorce in order to conserve some of their estate for their children is made apparent by the following: A community estate is $6,000,000.00; under the estate tax law, all of it may be taxed to the first to die, such tax to be $3,128,200.00. The second to die must then pay the tax of approximately $1,263,200 on his one-half interest. Thus the total tax on the death of the two spouses exceeds $4,300,000.00. By permanent separation or divorce, there will be at the death of the two spouses two taxes of approximately $1,200,000.00, or a total of $2,400,000.00, a tax saving achieved by separation of partnership property or divorce of approximately $2,000,000.00.

State, is owned one-half by each spouse, as tenants in common, and the wife will be recognized as owner of one-half of the community partnership property and property acquired with the proceeds of community property. (*Depas v. Mayo*, 11 Mo. 314, *Phillips v. Commissioner*, 9 B T A 153, *Succession of Popp*, 146 La. 464, 83 South 765, Solicitors Opinion 121, Internal Revenue Bulletin, Dec. 1921, Page 197; Restatement, Conflict of Laws, Sections 292 and 293; Beale, "Conflict of Laws" §292.1). Accordingly by the amendment of 1942 Congress made an amazing and arbitrary attempt to fix property rights in only the community partnership states for taxation purposes in the very teeth of the law of the states involved, while if the same property is removed to the other states of the Union, the latter states recognize the law of Louisiana and the property rights of the spouses; and Congress, following the law of the common law states, taxes the former community partnership husband and wife on the very basis that they would and should have been taxed on if the community property estate tax amendment had not been adopted. In short, Congress continues to recognize for estate tax purposes the law of common law states which recognize in common law terminology the law of Louisiana, but when dealing directly with Louisiana citizens and the same property, the Louisiana property law will be disregarded.

In common law states the separate and undivided ownership of the property and income of partners in limited or special partnerships are recognized by the Government in applying both the Federal Income and Estate Tax Laws. In Louisiana where the community partnership is substantially analogous to a special or limited partnership in common law states, the 1942 amendment is designed by legislative *fiat* to disregard

the separate ownership of husband and wife.[15]. In connection with the arbitrary discrimination resulting from the different treatment of voluntary partnerships, it is important to note that twenty-five common law states and the District of Columbia permit husbands and wives to form partnerships voluntarily (452 C.C.H. Federal Tax Reporter §1169.21).

In these common law states, husbands and wives may make voluntary partnership agreements which frequently accomplish the same result, by contract, that the public policy and law accomplishes in Louisiana. Where such a bona fide partnership agreement has been entered into between husband and wife in these common law states, the Commissioner of Internal Revenue has rec-

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[15]The Supreme Court of Louisiana in the *Succession of Wiener* said: "That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired, is well settled in this state. * * * It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of her husband but, instead, from an express legal contract of partnership entered into at the time of the marriage. There is no substantial difference between her interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract."

In *Childers v. Johnson*, 6 La. Ann. 634, 641, decided in 1851, the Supreme Court of Louisiana, in discussing the community partnership, said: "This partnership, the intervenors, who are creditors of the community, have a right to consider as legal entity; like other partnerships, it must be contemplated as an ideal being, *etre moral*, distinct from the persons who compose it, having its rights and its obligations, its assets and its liabilities, its debtors and its creditors. Mrs. Patton is not the debtor of her husband for the $2000 expended for her benefit. She is the debtor of the community. She owed this debt before her marriage. The community derived no benefit from its creation. Instead of paying it with her own money, it has been paid with money of the community. * * * Is she permitted thus to enrich herself, at the expense of the community, and of *bona fide* creditors of that community? Clearly not. This results from that general principle applicable to all partnerships, which is, that a partner must account to the partnership for what he has drawn from it for his individual business and advantage. * * *"

In *Poe v. Seaborn*, this court said: "Powers of partners or trustees of a spendthrift trust furnish apt analogies."

ognized that each spouse may return his or her distributive share of the partnership income and is liable only for the tax upon such share. Numerous cases, both in the Federal Courts and before the Board of Tax Appeals, recognize that, under the common law system, separate returns of husbands and wives effecting a division of income may easily be arranged by any one of a number of legal transactions which have been sanctioned by the law.[16] The same recognition would have to be accorded logically to such legal relationships in connection with the application of the Federal Estate Tax Law.

But in Louisiana, none of the contractual transactions we have referred to above, which have been held legal in common law states, is legally permissible. Husband and wife in Louisiana cannot make contracts with each other or enter into partnership agreements.[17] Thus while the common law states, by a variety of legal

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[16]For example, an informal joint venture or partnership for the purpose of trading on the stock exchange has been recognized as legally authorizing husband and wife to return one-half of the profits each. *Tracy v. Commissioner* (C.C.A. 6th Cir.) 70 F. (2d) 93. Likewise an oral agreement that a partnership should exist in a lumber business between husband and wife, although the wife takes no active part in the business, will authorize separate returns, and, in the same case, a donation of a farm by the husband, which the husband subsequently rented from the wife, was authorized and the wife was permitted to return the profits from the farm. *Virden v. Commissioner,* 6 B.T.A. 1123. A simple declaration by the husband that he is purchasing certain property and that the ownership is to be divided equally between him and his wife authorizes the wife to return one-half of the profit resulting from a subsequent sale on her separate income tax. *Wright v. Commissioner,* 26 B.T.A. 21. In another case a husband gave his wife an interest of $100,000.00 in his business and entered into a partnership agreement with her in which the wife, as a special or limited partner, was to be entitled to 25% of the profits. The Court held this a valid partnership and permitted separate income tax retuns. *Walter W. Moyer,* 35 B.T.A. 1155. There are numerous other cases illustrating the same principle and rulings; *Humphreys v Commissioner,* 88 F. (2d) 430; *E. R. Ledbetter,* B.T.A. Dkt. No. 104852; *R. C. Bennett v. Commissioner,* B.T.A. Memo. Dkt No 101715; *A. G. Dickinson,* 23 B.T.A. 1212; *Dunham v. Commissioner,* 27 B.T.A. 1068; *Gillette v. Commissioner,* 18 B.T.A. 434; *In Re Bellingrath,* 3 B.T.A. 11; *First National Bank v. Commissioner,* 13 B.T.A., 1096, *Commissioner v. Barne's Estate,* 30 Fed. (2d) 289, affirming 7 B.T.A. 924; *Rose v. Commissioner,* 65 Fed. (2d) 616; *James R. Cray,* 7 B.T.A. 322.

[17]Louisiana Revised Civil Code, Articles 2446, 2329 and 1790.

transactions between husband and wife which have already been approved by the Government, permit the making of separate returns by husbands and wives and the application of the estate tax on the basis of their separate ownership, none of these methods accepted as legal in common law states is possible under Louisiana law.

Moreover, the voluntary partnership arrangement between husbands and wives in the common law states, referred to above, will not be affected or changed by the 1942 Community Property Estate Tax Amendment, because it only applies to so-called community partnership states, and is, therefore, intended to and actually does affect only eight community partnership states. The adoption of the 1942 Community Property Estate Tax Amendment, if upheld, will have the effect of permitting the taxation of one-half of the partnership property of husbands and wives who are voluntary partners in other states, while in Louisiana and the other community partnership states, where a partnership between husband and wife is created by law and called a "community partnership", the statute will require the estate tax to be imposed upon the community partnership property belonging to both the husband and wife, depending upon the accident of which spouse dies first. Hence, it would result that under the 1942 act what in a common law state is in reality community partnership property, although not technically defined as such, would be accorded the same recognition taxwise as was accorded to all community partnership property prior to the passage of that act, whereas community partnership property in community partnership states would for the first time be taxed otherwise.

The unconstitutional, arbitrary and discriminatory character of the 1942 Community Property Estate Tax

Amendment is discussed at some length in deFuniak, "Principles of Community Property", Volume 1, Section 255. The auther in the conclusion to his discussion, on page 719, says:

> "There can be no more justification for Congress saying that such an inherent principle of the law of the community property states shall be ignored and the income considered as separate property of the one earning it than there would be for Congress declaring that for purposes of taxation it will ignore the law of non-community property states and consider all earnings of one spouse as belonging equally to both."

It is apparent, therefore, that Section 402 (b) (2) applies varying, capricious, arbitrary and confiscatory tests to measure the estate tax laid upon community partnership estates, and upon such estates alone. The statute (1) is wholly capricious, arbitrary and violative of due process of law, and (2) offends the geographical uniformity provisions of the Federal Constitution.

The 1942 Community Property Amendments Were Approved and Reported by the Ways and Means Committee without a hearing being given to representatives of the Community Partnership States.

Much is made in the Solicitor General's brief of what he styles the legislative history of the statutory provisions here in controversy. He omits to tell the Court, however, that five attempts between 1920 and 1942 were made to take away, by legislative *fiat*, the rights given to husbands and wives in community partnership states by their local laws, and that every such effort prior to 1942 to have Congress disregard, for tax purposes, the laws of the traditional community property states failed. Indeed, most of those efforts

died in committee, after a public hearing had been given to the opponents, and the unfairness and discriminatory nature of the proposed legislation had been submitted to and fully considered by the Congress. On two other occasions after exhaustive debate on the floor of the Senate, amendments designed to disregard the laws of the community property states for tax purposes were rejected when opposed because shown to be unfair, confiscatory and a gross discrimination against the community partnership states.

The favorable report of the Ways and Means Committee upon the 1942 amendments, emphasized in the Solicitor General's brief, was the result of a decision had by the committee behind closed doors in executive session shortly before the bill was reported to the House. No hearing was granted and no opportunity whatsoever was given to representatives of the community property states to discuss the unfairness and discrimination involved in the proposed legislation. The exigencies of war, and the need for its immediate financing, prevented that debate upon the floor which would have permitted the shedding of proper light upon the subject. This resulted in the statute being rushed through without the granting of a public hearing which is traditional in American legislative procedure.

The summary of the legislative history referred to will be found in Appendix C of this brief, pp. 24 *et seq.*.

THE STATUTE CANNOT BE SUPPORTED ON THE BASIS THAT ECONOMIC BENEFITS WERE SHIFTED AT DEATH

The statute cannot be supported constitutionally on the basis that economic benefits were shifted at death. True, if the husband dies first, there is cessation of his

management but the statute, neither in its terms nor in its operative effect is directed at cessation of management. We will hereafter show that where the wife dies first, there is no shifting of management, and obviously this test is not applicable under such circumstances. This theory is suggested by the Government to support its contention in support of the entire statute, when the circumstance of cessation of management occurs in only **one-half** of the situations covered by the statute, namely only when the husband dies first instead of the wife dying first. The statute itself does not mention or indicate that cessation of management or shifting of management is the basis of the tax. Moreover, the committee reports explaining the statute do not mention cessation or shifting of management as the basis or theory of the statute, but show clearly that ownership and the power of testamentary disposition is adopted as the occasion for the tax in certain cases; the origin of the property or the person to whom the property is "economically attributable" is adopted as the occasion for the tax in other cases; and the wholly insupportable presumption of dual ownership of the entire property is adopted as the rule in most cases.

But even if, for purposes of argument, we isolate the situations where the husband dies first and where there is a cessation of his management as managing partner of the community, it is clear that this cessation of management cannot constitutionally be made the subject of an estate tax.

We have shown in our summary of the rights of husband and wife under the Louisiana Community Partnership law (pages 12 to 20, *supra*) that the right of the husband is analogous to that of a managing partner of a **limited partnership** at common law or a

trustee of a spendthrift trust. The husband's limited agency, as this Court pointed out in *Bender vs. Pfaff*, 282 U. S. 127, is like any other agency, charged with the duty of honest and prudent management. The law of Louisiana gives to the wife an effective remedy against imprudence, mismanagement or dishonesty which might cause pecuniary loss to her, or to the community. She has the right at any time to bring about the dissolution of the community partnership and remove her husband as agent and manager of the community partnership on a proper showing of mismanagement or dishonesty and she is entitled to an accounting by the husband to obtain reimbursement for any losses or damages sustained as a result of his mismanagement or dishonesty.

In *Poe v. Seaborn*, 282 U.S. 101, 112, **this Court repelled the argument** that the agency of the husband was an attribute of property. Repeating its previous holding in *Warburton v. White*, 176 U. S. 484, the Court pointed out:

> "Power is not synonymous with right. The law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner."

And when this Court came to the Louisiana case, *Bender v. Pfaff*, 282 U. S. 127, 132, it said:

> "While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system. In Louisiana, if the husband proves, by reason of financial difficulties or the like, an unfit manager, the wife may bring about an immediate dissolution and liquidation of the community property. *Wolf v. Lowry*, 10 La. Ann 272; *Webb v.*

> *Bell,* 24 La. Ann 75; *Brown v. Smythe,* 40 La. Ann. 325, 4 So. 300. And when the wife sues for a separation of the property she is entitled to an accounting from the husband for community income or property in his hands and to reimbursement and retribution for any act done by him in fraud of her rights. *Hill v. Hill,* 115 La. 489, 39 So. 503; *White v. White,* 159 La. 1065, 106 So. 567."

Thus, the exclusive agency of the husband for the community partnership is no more a property right than is the managerial agency of a trustee or managing partner of a limited partnership, or of a tutor (guardian), over the property of his ward. The husband, under the law of Louisiana, owns his one-half, the wife owns her one-half. He manages the partnership property, because in the eye of the law, it is essential that that management be single and not divided. In Louisiana, as we have said, the management or agency of the husband could have been done away with entirely by antenuptial contract, or by the same species of agreement, the exclusive management could have vested in the wife. If no antenuptial provision to the contrary is made, the law of Louisiana, as a matter of ancient and settled policy, by legislative mandate creates and establishes the community partnership relationship with the husband as managing agent or partner. The wife's position in the community partnership is not materially different from that of any limited partner at common law where the articles of partnership provide for exclusive management by one of the partners. The wife's position is also substantially analogous to the beneficiary of a spendthrift trust under common law state statutes. This is not only the law of Louisiana as repeatedly stated by its Supreme Court, but this substantial analogy has been recognized by this Court. In *Poe v. Seaborn,* the Court

said: "Powers of partners or trustees of a spendthrift trust furnish apt analogies." There may be some formal and technical differences, but the substantial practical similarity in law and in practical fact cannot be controverted.[18]

The husband, as this Court pointed out in *Bender v. Pfaff, supra*, is, like any other agent, charged with the duty of honest and prudent management. As long as the husband's management is prudent and honest, the wife has nothing to gain by divesting him of the agency; on the contrary, such action would be to her injury. Upon what theory then can it be said that the wife secures an economic benefit by the husband's death? Of course, that event confers on her no property, for the half of the community partnership had always belonged to her. She has merely lost the services of her chosen agent. Her husband's death is a disaster, not an economic benefit. If such loss could be the occasion, within the Constitution, of the exaction of a federal tax, so likewise could the termination of the powers of the exclusive manager of a limited partnership, the death of a trustee of a spendthrift trust, or indeed, of any trustee, or the coming of age of a minor, in a common law state.

In *Warburton v. White*, 176 U.S. 484, 44 L. Ed. 555, and *Arnett v. Reade*, 220 U.S. 311, 55 L. Ed. 477, this Court distinctly held that the management and control of the husband in a community property state is not property, but that the wife's half interest in community property is an absolute property interest protected by the 14th Amendment. In these cases, this Court conclusively established the rule that under the Federal Constitution a husband having by state law the management of community partnership property may be de-

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[18]See Note 16 *supra*.

prived of that statutory agency by state or federal law without compensation, and the management may be changed from time to time without violating the Constitution, because management is not property. On the other hand, this Court held that the wife, as owner of a half interest in community partnership property, cannot be deprived of that half interest by change of local statutory law in any way, because the wife has property and ownership which is protected by the 14th and 5th Amendments. The 1942 statute, therefore, apparently undertakes to tax as property that which this Court has held is not property, namely, the shifting of management, and at the same time the statute refuses recognition to that which this Court has held is property, namely, the wife's vested ownership of one-half of the community partnership property.

The decision in *U. S. v. Goodyear* C.C.A. 9, 99 Fed. 2d 523, illustrates the well-recognized rule of law that management is not property or an economic benefit as these terms are ordinarily understood in law. That case dealt with the California community law. In California, the wife had no vested or real ownership in community property until the enactment of the California Statute in 1927 giving the spouses equal undivided interests and ownership. A California husband conveyed to his wife "a present, existing and equal interest" in community property which had been acquired by him before 1927. When the husband died, the government attempted to include for estate tax purposes the half of the community property belonging to the wife on the theory that the husband's management as agent of the community was property and came within the Federal statute imposing an estate tax on all property of the decedent "to the extent of any interest therein of which

the decedent has at any time made * * * a transfer under which the transferor has retained for his life * * * the possession or enjoyment of * * * the property." The Court of Appeals, in denying the government's contention said:

> "Both spouses had possession and enjoyment of the property and owned the income therefrom, although the property was subject to 'management and control' by decedent. The terms 'management and control' are not synonymous with 'possession and enjoyment'. That one may manage and control property without either possession or enjoyment is illustrated by the situation where an agent manages real property for the owner. In such case although the agent may have absolute control in managing and renting the property and in collecting rents, the rents belong to the owner who enjoys them. We think that theoretically each spouse had possession and enjoyment of his particular interest. Decedent, therefore, did not possess and enjoy his wife's interest. If in controlling and managing the property, decedent transferred possession and enjoyment to a third person, the fruits received for such transfer were then owned by both spouses."

This Court again announced a similar principle and rule in *Reinecke v. Northern Trust Company*, 278 U.S. 339. Speaking through Mr. Justice (now Chief Justice) Stone, the Court said:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of

the tax was thus complete as soon as the trust was made."

In other words, it was argued that the reservation of the right of management when property was conveyed to a donee was a reservation of economic control and benefits equivalent to property rights, and that upon the death of the person reserving to himself these rights there was a shifting of these rights to the owner and donee of the property. This Court held that this was not a shifting of economic benefits.

So, in this case, the economic interest was the wife's from the moment the property was acquired. It was complete at that time and did not pass at the husband's death upon the mere cessation of his management because his management did not involve any shifting of economic benefits within the meaning of the law and its interpretation by this Court. It is hardly necessary to point out that it has never been suggested before in a community property state or in a common law state that the death of a trustee involves a shifting of benefits to the beneficiary of the trust that would justify including the beneficiary's property in the estate of the decedent trustee. It has never been suggested that, when a managing partner of a limited partnership in a common law or community partnership law state dies, the deceased partner's estate should be taxable on the basis of adding the value of the partnership interest of the surviving partner or partners. It has never been suggested that, if a tutor or curator or guardian dies, his estate should pay a tax based on the addition to his estate of the value of the estate of the minor or interdict.

The summary of the ownership and rights held by the wife, when contrasted to the limited, restricted and circumscribed agency powers of the husband under the law

of Louisiana (pages 12 to 20, *supra*) is sufficient to show that the husband's death confers no real or substantial economic benefits on the wife with respect to that undivided one-half interest in the partnership property which she has always owned.

The cases decided by this Court, cited herein, make clear that something more than mere management must pass. There must be some shifting of substantial economic interest in the whole property to justify an estate tax measured by the whole of the property. It will not do to select, as a matter of technical argument, one "straw" from the "bundle of rights" that go to make up ownership (when the "straw" is so unsubstantial that it may be changed as often as state lawmakers see fit, or by contract or otherwise without affecting ownership as this Court has decided), and to tax that "straw" on the basis of the value of the whole "bundle."

We submit that the statute clearly offends the **due process** clause of the 5th Amendment.

WHEN THE WIFE DIES FIRST, THERE IS NO BASIS FOR THE ARGUMENT THAT THERE IS CESSATION OF MANAGEMENT OR SHIFTING OF SO-CALLED ECONOMIC BENEFITS.

We have shown that the argument of the Solicitor General that the so-called cessation of management, when the husband dies first, was not intended by the Act of Congress as a basis for the tax, and if it was intended as a basis for the tax, it does not constitutionally justify the tax. The fallacy and inadequacy of the Government's argument in this connection becomes even more apparent when the wife dies first. There is not

even the cessation of bare management at her death, and certainly what takes place then is no so-called shifting of economic benefit to the husband or to the husband's half interest in the community partnership estate.

The application of the statute is not limited to the case where the husband dies first; its language compels its equal application where the husband is the survivor. It expressly provides that there **shall** be included in the taxable estate of the decedent: "the interest therein held as community property by the **decedent and surviving spouse**". Neither "decedent nor" "spouse" has particular gender. The "decedent" may well be the wife, the "surviving spouse" the husband. In such case, no one could be heard to contend that the husband had acquired any rights by his wife's death. She had no management of either half interest in the community partnership property prior to her death. After her death, the husband continues to manage his half interest. He has, in fact, lost whatever management and control he possessed over the wife's half interest during the marriage. Yet the statute operates equally in the assumed case as under the facts here involved. Moreover, as pointed out by the Supreme Court of Louisiana, the wife may have died testate. She may have willed all her property to a stranger or to an enemy of the husband or to a paramour. In that case, the husband whose efforts had contributed so effectively to the building up of the community estate, finds himself still the owner of his original one-half, it is true, but with no power whatsoever over the other one-half; on the contrary, with the loss of its management and burdened with co-owners with whom he may be in utter disagreement.

Yet, when the wife dies, the statute wou[illegible] include

the husband's half of the community partnership property, which he always has owned, in imposing the tax upon the wife's half interest in the community partnership estate. In such a case, if the converse of the government's argument is logically applied, the tax is imposed because, instead of being invested by his wife's death with a right of management, the husband has lost whatever right in that respect that he had before possessed.

If the government suggests that the cessation of management is the basis for constitutional authority to impose a tax on the wife's share of the community partnership when the husband dies first, it must to be consistent explain why, when the wife dies first and there is no cessation of management of his half and an actual loss of management over his wife's half of the community partnership, the husband's share of the property should nevertheless be added to the wife's share and estate in measuring and imposing the estate tax. But the government cannot and has not supplied any consistent, much less, convincing explanation.

Obviously, in an endeavor to avoid the ineluctable conclusion that the statute is void because not separable, and that the reason for its imposition is wholly wanting in the case of the predecease of the wife, the Solicitor General suggests in his brief (page 53) that the death of the wife frees the husband "from the fetters deemed substantial in *Bender v. Pfaff.*" We must confess inability to understand. The Solicitor General does not name the fetters. If he means, as he must, that the husband becomes freed from responsibility for mismanagement, or that he is relieved from that accountability which is the concomitant of agency, he is but emphasizing the mere managerial powers of the husband with respect to the

wife's half interest in the community partnership property. An analysis of *Bender v. Pfaff*, and of the Louisiana cases, would show that that is all he could possibly mean. For there are never any "fetters" on the husband in **respect of his own half** of the property, either during the community partnership or after its dissolution, and the death of the wife consequently could not, under the widest stretch of the imagination, operate to increase his rights over **his own** undivided half.

THE STATUTE IS NOT SEPARABLE

The government cannot escape its dilemma by suggesting that the statute is separable. We have already pointed out that the statute does not use the words **husband** or **wife.** It refers to "decedent", and "spouse", which have no gender and obviously show that the statute was intended to apply to either husband or wife, according to which spouse died first. On settled principles, it is clear that if the statute be invalid in the case of the predecease of the wife, it is equally invalid in the case where it is the husband who died first.

> "By accepted canons of construction the provisions of the act in respect of this tax are not capable of separation." *Bowman v. Continental Oil Co.*, 256 U.S. 648.

Congress in the 1942 Amendments assumed to deal with the community as an entity. It carefully displayed its intent in the use of terms indifferently applicable to husband and wife. It provided for inclusion in the taxable estate of any "decedent" of the interest held as community property by the "decedent" and "surviving spouse." Nowhere in the statute may there be found aught upon which to hang argument that Congress would have legislated for this inclusion in the case of the

husband only, or in the case of the wife alone. It is an all-inclusive provision, intended to follow the analogy of the inclusion of the entire property held by "tenants by the entirety", or by "joint tenants". Even if Congress could have legislated validly to include the entire community partnership property in the case of the death of the husband, its attempt here so to include the whole community partnership property in the case of the death of either of the spouses renders the entire enactment unconstitutional.

As this Court said in *Butts v. M. & M. Transp. Co.*, 230 U. S., 126, 134, quoting from *United States v. Reese*, 92 U. S. 214:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. * * * The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. * * * The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its Constitutional limitations, and attempts to do that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must, annul its encroachments * * * . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

The doctrine of *United States v. Reese*, is fundamental in constitutional jurisprudence. See *Trademark*

Cases, 100 U.S. 82, 99; *Poindexter v. Greenhow*, 114 U.S. 270, 304; *Baldwin v. Franks*, 120 U.S. 678, 685; *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 601, 636; *Allen v. Louisiana*, 103 U.S. 84; *United States v. Harris*, 106 U.S. 641; *James v. Bowman*, 190 U.S. 127, 140; *United States v. Ju Toy*, 198 U. S. 253, 262; *Dorchy v. Kansas*, 264 U.S. 286, 290; *Yu Cong Eng v. Trinidad*, 271 U.S. 521.

Decisions from the Circuit Courts of Appeal to the same effect are almost without number. Well-considered decisions will be found in *Pflueger v. United States*, 121 Fed. (2d) 732, 735; *Cella Com. Co. v. Bohlinger*, 147 Fed. 419, 8 L.R.A. (NS) 537,542.

It cannot be argued that one may complain only when his own constitutional rights are invaded, and that, consequently, decisions upon the constitutional issue should be reserved until there be before the Court a case where the wife predeceased her husband in community.

Such an argument, if made, would ignore what is fundamental; that no tax may be exacted without a statute so providing, and that no statute conflicting with the Constitution may have the effect of law.

The argument, moreover, is unsound because it is to the will of Congress, as expressed in the statute, that we must look to determine whether legal authority for the imposition of a tax exists. If the statute by any construction would have been valid had it applied to the husband alone, it must by the same reasoning be held invalid when used as the basis for measuring the estate tax on the predecease of the wife. If Congress has so enacted the statute as to require judicial legislation to separate its effect in the two cases, i. e. in the death of the husband and in the death of the wife, then the

statute falls as a whole, and there is no authority for the inclusion of the entire community in the case of the death of either of the spouses.

This conclusion necessarily flows from a multitude of decisions by this Court.

In *United States v. Reese*, 92 U.S. 214, the statute held unconstitutional might constitutionally have been enacted had its effect been confined to the offense for which the defendant was indicted. Because, however, its effect extended to a field in which Congress had no power, this Court held it null as a whole, and avoided the indictment:

> "We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, if there be any such, from that which is not."

The *Reese* case was followed in the *Trademark Cases*, 100 U.S. 82, where this Court rejected the contention that the trademark statute might be sustained in part, because of the power of Congress to regulate trademarks used in commerce with foreign nations and in interstate commerce.

Again the same doctrine was announced in *Allen v. Louisiana*, 103 U.S.80, and in *United States v. Harris*, 106 U.S. 641.

In the leading case of *Poindexter v. Greenhow*, 114

U.S. 270, the same issue was presented in a civil proceeding. There this Court said, page 305:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinetly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In *Baldwin v. Franks*, 120 U.S. 678, Congress clearly had the power to penalize the specific offense of which the defendant was accused. But because the statute, in addition, covered other acts whose punishment was not within the power of Congress, and because a reading of the Statute demonstrated that its provisions were inseparable without judicial legislation, the Court held the entire statute unconstitutional and discharged the defendant.

The precise point was again decided in *James v. Bowman*, 190 U.S. 127, 142.

As said by Mr. Justice Holmes in *United States v. Ju Toy*, 198 U.S. 253, 262:

> "The relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

The whole subject is reviewed in *Butts v. M. & M. Tansp. Co.*, 230 U.S. 126, where, again, the punishment of the specific offense would have been within the competency of Congress, but where the statute, in general terms, included offenses not within its power of legislation.

In *Yu Cong Eng v. Trinidad*, 271 U.S. 521, the doctrine of the *Reese* case was again involved, this Court saying:

> "We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation."

In the *First Employers' Liability* case, *Howard v. I. C. R. Co.*, 207 U.S. 463, there was at issue the constitutional validity of the Act of Congress of June 11, 1906, 34 Stats. 232. The employee was killed while serving as a fireman on a locomotive actually engaged in moving an interstate commerce train. It was conceded that Congress had the power to legislate with respect to employers' liability as to employees actually engaged in interstate commerce (as this Court subsequently had occasion to hold in the *Second Employers' Liability* case, *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U.S. 1). This Court, however, held that the statute unambiguously covered all operations, in intrastate as well as in interstate commerce, thus including a subject matter clearly beyond the power of Congress. The Court, therefore, denied the plaintiff relief, although the decedent's injury was occasioned while he was engaged in interstate

commerce, as to which Congress could validly have legislated.

In response to the argument that the statute might be sustained as to interstate commerce, this Court said:

> "The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy."

Upon a consideration of these authorities, it is, with respect, submitted that all of the arguments advanced to support the statute upon the theory that the wife comes into possession of a right upon the death of her husband must wholly fail even if they had otherwise the semblance of substance, when it is considered that the statute operates equally upon the death of either spouse, and that the prior death of the wife can, in no sense of the word, be said to confer any right of any kind or character upon the husband.

SECTION 402 (b) OF THE REVENUE ACT OF 1942 IS ARBITRARY, CONFISCATORY AND CAPRICIOUS IN THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The statute, as amended by Section 402 (b) of the Revenue Act of 1942, clearly violates the principle announced in *Hoeper v. Tax Commission*, 284 U.S. 206, that "any attempt * * * to measure the tax on one person's property * * * by reference to the property of another is contrary to due process of law." This Court, in the *Community Property* cases (282 U.S. 101, 118, 122, 127, 792) clearly recognized that the wife is a full and equal owner with her husband in community partnership property. The Supreme Court of Louisiana in the *Succession of Wiener*, 203 La. 649, 14 So. (2d) 475, decided June 21, 1943, pointed out that the surviving wife "is the half partner and owner of all acquisitions made during the existence of the marriage". In *Poe v. Seaborn*, 282 U.S. 101, this Court recognized that "the powers of partners, or of trustees of a spendthrift trust, furnish apt analogies". The Louisiana Supreme Court in the *Wiener* case points out that "there is no substantial difference between her (the wife's) interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to the managing partner."

Since it is settled, as a matter of local law, that title to community property vests *eo instanti* at its acquisition equally in husband and wife, it would seem necessarily to follow that the case presented is no different from that which would be involved in an attempt by Congress

to include in the estate of any tenant in common the value of the entire interest in all property in which he had co-owners.[19]

The inclusion, therefore, in the estate of the husband of property which he never owned, with the result of imposing upon his heirs a tax liability measured by the value of that which they acquired by his death, **plus** the value of that which belonged to someone other than the decedent, would be directly inconsistent with the due process guaranteed by the Fifth Amendment, as interpreted by this Court.

Therefore, this statute violates the principle announced in the *Hoeper* case in that it measures the tax on one person's property by reference to the property of another, just as it would violate due process to tax one partner at death on the surviving partner's interest, or to tax a beneficiary upon the death of a trustee where such trustee never at any time owned or had any economic interest in the trust properties. Since "there is no substantial difference" between the interest of each spouse in community partnership property and the interest of any partner in partnership property or the interest of a beneficiary in trust property, the statute, in measuring the tax of the first to die by the full value of the surviving spouse's interest arbitrarily takes property without due process.

In the *Hoeper* case, a Wisconsin statute required the filing of a joint return by husband and wife for state income taxes; the combined total of income of husband and wife being then taxed according to graduated scale.

[19]Of course, it is fundamental that each state has the power to determine for itself the manner and conditions upon which property situated within its boundaries may be acquired, enjoyed and transferred. *Pennoyer v. Neff*, 95 U.S. 714, 722. It has always been considered inconceivable that the Federal Government has power to vary the law of descent in any state. *The Federalist*, Number XXXI.

The statute was attacked as violative of the Fourteenth Amendment. Reversing the decision of the Supreme Court of Wisconsin, 202 Wis. 493, 233 N.W. 100, which had sustained the constitutionality of the act upon the ground that the statute merely retained or re-established what was formerly an incident of the marriage relation, this Court said:

> "The question presented is whether the state has power by an income-tax law to measure his (the husband's) tax, not by his own income, but, in part, by that of another. To the problem thus stated, what was said in *Knowlton v. Moore*, 178 U.S. 41, 77, is apposite:
>
> > 'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'"

After thus referring to the observations in *Knowlton v. Moore*, the Court concluded:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income." (Compare *Nichols v. Coolidge*, 274 U.S. 531, 540.)

In *Nichols v. Coolidge*, 274 U.S. 531, this Court expressly recognized the controlling effect of the Fifth Amendment upon the power of Congress in the levying of an inheritance tax. In that case, the Court held that so much of paragraph 402 (c) of the Revenue Act of 1919 as required the inclusion in the gross estate of a decedent, for the purpose of estate taxation, of the value of property donated by the decedent prior to its passage, directed a taking of property without due process of law. The Court said:

> "We must conclude that 402 (c) of the statute here under consideration, insofar as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Later, the statute stricken in *Nichols v. Coolidge*, was amended so as to provide merely that any transfer made within two years prior to the death of a decedent should be deemed to have been made in contemplation of death and, therefore, was to be included in the estate for the purpose of measuring the estate tax. The constitutionality of this statute under the Fifth Amendment came before the Court in *Heiner v. Donnan*, 285 U.S. 312. Upon the express authority of the *Hoeper* case, the Court said:

> "The restraint imposed upon legislation by the due process clauses of the two amendments in the same. *Coolidge v. Long*, 282 U.S. 582, 596. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. *Nichols v. Coolidge*, 274 U.S. 531; *Brushaber v. Union P. R.*

Co., 240 U.S. 1, 24, 25; *Tyler v. United States, supra*, (281 U.S. p. 504)."

Then, after discussing the *Hoeper* case, the Court said:

> "In substance and effect, the situation presented in the *Hoeper* case is the same as that presented here. * * * **The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description.** Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. **Such an exaction is not taxation but spoliation.** 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' *United States v. Baltimore & O. R. Co.*, 17 Wall. 322, 326." (Emphasis ours.)

And, as aptly remarked by Judge Learned Hand in *Frew v. Bowers*, 12 Fed (2d) 625, 630 (C.C.A. 2):

> "Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grevious injustice."

See also *Lewellyn v. Frick*, 268 U.S. 238.

The statute here is much more capricious and much more arbitrary than the statutes considered in any of the foregoing cases. As shown above, it adopts wholly

arbitrary and confiscatory tests, applicable only in the community partnership property states. It not only measures one person's tax by another's property, it treats two persons as owning at the same time the same property; it completely disregards States rules of property and applies one rule of taxation when one spouse dies, and another rule when the other dies. It makes the incidence of the tax depend on the sheer accident of which of the two spouses should happen to die first. It creates double taxation and will completely confiscate many estates.

The statute is also unconstitutional because it creates wholly arbitrary and capricious presumptions contrary to both law and fact. As stated above, the bulk of community partnership property on hand at the death of either spouse will constitute partnership property not directly traceable to compensation for "personal services" or separate property of either spouse. (See pages 36 to 39, *supra.*) Thus, in the majority of cases, the statute, by taxing the full value of property to the first spouse to die, creates the wholly arbitrary and capricious presumption that the first spouse to die owned the whole of the community partnership property. (Louisiana Civil Code, Article 2405, Appendix p. 11 *infra.*) The fact, controlled by local law, is directly to the contrary. The property is owned one-half by each spouse. The arbitrary presumption upon which the statute proceeds is contrary to the facts in this case. Where community partnership property is acquired through the creation of a community partnership debt, or where a storekeeper and his wife build up an estate through their joint efforts, or a farmer and his wife through their joint efforts till the soil, it is utterly contrary to the fact, even if economic contribution were the controlling factor, to say that the entire community partnership property is owned by the

first spouse to die; that it is owned entirely by the husband, should he die first, and that it is owned entirely by the wife, should she die first. There is certainly no rational connection between the real facts and the facts presumed. (*Tot v. United States*, 319 U.S. 463, 87 L. Ed. 1519.) As stated by this Court in *Bailey v. Alabama*, 219 U.S. 219, "A constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment." See also *Manley v. Georgia*, 279 U.S. 1, 5-6. Certainly, the presumption in this case that two persons at the same time own in its entirety the same property is much more capricious, arbitrary and unsupportable than the two-year presumption, declared invalid in *Heiner v. Donnan, supra*, and even the six-year presumption invalidated in *Schlesinger v. Wisconsin*, 270 U.S. 230. See also *Hall v. White*, 48 F. (2d) 1060; *Guinzberg v. Anderson*, 51 F. (2d) 592; *American Security Company et al.*, 24 B T A 334; *State Tax Commission v. Robinson's Executor*, 234 Ky. 415, 28 S W (2d) 491.

Under existing authorities it cannot be argued that Congress could retroactively impose an estate tax with respect to an irrevocable outright gift of property made by the decedent to a member of his family, where such a gift was neither in contemplation of, nor intended to take effect in possession or enjoyment, after death. (*Nichols v. Coolidge*, 274 U.S. 531.) The 1942 statute does even more than this. It undertakes to ascribe significance to the origin of wealth without any regard to the ownership of property either at origin or at death.[20]

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[20]The attempt by the statute to attribute importance to "compensation for services actually rendered" by one spouse or the other is, of course meaningless, since under community property law, community property is not earned or derived by the spouse whose services may have preponderated in producing it, but by the community. As this Court said in *Poe v. Seaborn, supra*: "But here the husband never had

It undertakes to tax an individual merely because his action may have in fact given rise to that wealth and also in cases where it did not give rise to it all, although at the time of its acquisition he did not own the property and, at the time of his death, he possessed no economic interest therein. Indeed, this statute contains all the pernicious elements of a retroactive law. For the first time it undertakes to make the estate tax depend on the source of funds used in acquiring property many years prior to death. It imposes upon spouses in the community partnership property states the impossible burden of tracing back through the many transactions of a long lifetime the origin of each item of property on hand at death. Unless this origin is traced into the separate earnings or the separate property of the survivor, the estate of the decedent must pay the tax on the whole. Even if a successful tracing to the survivor could be accomplished, the decedent's estate must, nevertheless, pay the tax on half. Never before has it been intimated that husband and wife must between themselves maintain accurate records of their individual transactions. This statute then takes them entirely by surprise and by reaching back and attaching tax significance to methods by which property was acquired many years prior to death, it contains all of the unjust elements of a retroactive tax. (*Cf. Frew v. Bowers*, 12 F. (2d)

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[20]—(Continued)

ownership. That is in the community at the moment of acquisition." The Louisiana Supreme Court in the *Succession of Wiener, supra*, clearly points out that whatever is acquired by the community is the "product of the reciprocal industry and labor of both husband and wife. * * * In Louisiana, the civil law prevails, and the humane and realistic theory of the civil law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy and sacrifices of the husband and wife; in her station the wife is just as much an agency in acquiring this property as is her husband. In Louisiana, therefore, the wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity." See also *Succession of Costa*, 19 La. Ann. 14.

625, 630, and see Stone, J., dissenting in *Heiner v. Donnan*, *supra*, 285 U.S. 312.)

As stated in *Nichols v. Coolidge*, *supra*, "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions not testamentary in character and beyond recall."

We submit that the statute clearly offends the due process clause of the Fifth Amendment.

THE STATUTE CANNOT BE JUSTIFIED BY THE TYLER, JACOBS OR MOFFITT CASES

The Committee reports upon the 1942 statute show that reliance, as to the constitutionality of the statute, was placed upon the *Tyler* case, 281 U.S. 497 (Estates by Entirety), and the *Jacobs* case, 306 U.S. 363 (Joint Tenancy). But these cases do not support the amendment. The statute involved in those cases concerned gratuitous transfers by the decedent, either mediately or immediately, to his wife or to others as a tenant by the entirety or as a joint tenant with him. It dealt only with property which had originally belonged to the decedent. It dealt with such property only when the decedent in his lifetime had made a transfer thereof by gift or without consideration, retaining the right of survivorship always attached to such estates. This particular statute had been adopted to stop loop-holes and prevent estate tax avoidance. Thus, in the cases the committee erroneously relied upon, the Court had before it merely the question of including in the decedent's estate a gift by the decedent, which would not ripen into a complete gift until his death. The transfer was to take full effect in possession and enjoyment only on and because of

death. By gift, the decedent had created an estate which, if his joint tenant died first, would return in full to him and which required his prior death to confer on his donee the full possesison, use or enjoyment of the property. Thus, the statutory provisions dealing with joint tenancy and tenancy by entirety were directed at, and reached, transfers testamentary in character, in which substantial economic rights were retained in the donor for his life. The decisions in the *Tyler* and *Jacobs* cases are based upon five grounds, none of which applies in the case of community partnership property.[21]

1. In a "joint tenancy" and a "tenancy by the entirety" there is only one title and one tenure. Each joint tenant is the owner of the whole title, not an undivided part of it. As the Court said in the *Jacobs* case:

> "It is one estate because of the 'amiable fiction' of the common law under which ownership of a husband and wife in tenancy by the entirety is deemed a single, individual unity and each owns all and every part of the property so held. By virtue of this feudal fiction of complete ownership in each of two persons, the surviving tenant by the entirety is conceived to be the recipient of all the property upon the death of the co-tenant, * * * ."

The husband and wife in the community partnership have each an immediate, present, undivided ownership in the community partnership property and are "tenants in common". In a "tenancy in common", if there are only two tenants, there are two estates—one estate consists

[21]In the *Estate of Rogers v. Helvering*, 320 U.S. 410, 88 L. Ed. 135, Mr. Justice Frankfurter, speaking for the majority of the Court said: "For the purpose of ascertaining the *corpus* on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by decedent, values which but for such dispositions could not have existed."

of an undivided one-half interest and ownership in the property, and the other estate consists of the other undivided one-half interest and ownership in the property. This ownership of the spouses in Louisiana is not acquired from each other. There is no transfer to the community for the wife or for the husband. A "tenancy in common" arises by virtue of the community partnership law of Louisiana at the very moment the property is acquired by the community partnership.

2. The second important and significant characteristic which distinguishes a "joint tenancy" or "tenancy by the entirety" from a "tenancy in common" is the right of "survivorship". There is no right of testamentary disposition in either 'joint tenant" or in either "tenant by the entirety" and the property subject to the "joint tenancy" or the 'tenancy by the entirety" does not descend to the heirs of either tenant. Under the theory of "survivorship" there is no transfer of property or any succession under the theory of survivorship. If one of the "joint tenants" or "tenants by the entirety" dies, the other tenant becomes owner of the whole title and estate and the heirs of the deceased tenant have no right or interest in the property. This fundamental and distinguishing characteristic of a "joint tenancy" and a "tenancy by the entirety" was emphasized and pointed out in the *Jacobs* case when this Court said "**survivorship** is the predominant and distinguishing feature of each". On the contrary, in the case of a "tenancy in common", since each tenant is the vested owner of an undivided one-half of the property and each has a separate estate as undivided owner in the property, either tenant may dispose of his undivided share of the property by a will, and upon the death of either tenant in the absence of a will, the heirs of the deceased tenant take

decedent's undivided share of the property by inheritance.[22]

3. In the *Tyler* and *Jacobs* cases, death resulted in enlarging the survivor's property rights in all property used to measure the tax. Until such death, the survivor was not the complete owner of any share of the property; the legal rights of the decedent reached every part thereof. Death, therefore, became the generating source of important and definite accessions to the survivor's property rights. In contrast, the death of a community partnership spouse does not generate added property rights in the survivor's one-half of the property. If the wife should die first, nothing—not even in the nature of management—passes from the deceased wife to the living husband with regard to the surviving husband's share of the property. Yet the wife's estate under the 1942 amendment would, in most instances, be subjected to a tax on all of the husband's property. When the husband dies first, no rights devolve upon the wife unless it be said that she is rid of the bare managerial rights over her property theretofore held by her husband. We have already shown that these are not substantial rights in any economic sense and that a shift in the power to manage property may not be made the occasion of a tax

[22]In support of the above statements in connection with the essential legal distinctions between a "tenancy in common" and a "joint tenancy" or "tenancy by the entirety", see American Jurisprudence "COTENANCY", Sections 6, 7, 8, 12, 15 and 86.

It is interesting to note that the "joint tenancy" and "tenancy by the entirety" are technical tenures of property which are the relics of the medieval common law in England. They are in disfavor in the United States and their effect and application have been modified by statute. In this connection see Section 12 of 14 American Jurisprudence: "Statutory Restrictions.—Whatever may have been the causes that led to the development of the joint estate or what recommended it to our ancestors of the feudal period, it is undeniable that it is now in disfavor, both in America and in England. The policy of American law is opposed to survivorship, and, in accordance with this policy, legislation abrogating the common-law rule above mentioned and modifying or abolishing the doctrine of survivorship has been enacted in virtually every state. These statutes commonly provide in effect that all grants and devises of lands made to two or more persons shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."

measured by the value of that property managed. (See pages 57 to 65.)

4. In the *Tyler* and *Jacobs* cases, all of the property came mediately or immediately to the tenancy as a pure gift from the decedent. Manifestly, this is not true of community partnership property. The character of community attaches to the property at the very moment of acquisition and both husband and wife are powerless to prevent this result even if they then wanted to; the character of community does **not** attach because of a gift or by the voluntary choice of either or both husband and wife. Considering the nature of that common ownership which grows out of the marital partnership in Louisiana, neither the *Tyler* nor the *Jacobs* case may serve as authority for sustaining the statute under attack, because the interest of the wife does not arise out of a gratuitous title. It is as much an onerous title as is the interest of the husband.

In the eye of the law, the carrying out by the wife of her portion of the marital duties, is the complete economic equivalent of the husband's carrying out his portion of the marital duties despite the fact that these duties may consist of exertions in the field of trade, industry or commerce. Hence as a matter of that public policy which governs the tenure of property, the basic civil law of the State decrees that all property acquired by either spouse, by onerous title, is owned equally and jointly by each. With that principle, Congress cannot interfere.[23]

[23]Before the adoption of the Constitution, it was pointed out in *The Federalist*, No. 31: "Suppose, by some forced construction of its authority, (which indeed cannot easily be imagined), the Federal Legislature should attempt to vary the law of descent in any State, would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?" We might well substitute "the law of ownership or tenure of property", and the principle would be identical. See the observations of this Court in *Pennoyer v. Neff*, 95 U.S. 714, 722.

It, therefore, is clear that under the law of Louisiana, the wife's interest does not proceed from a gratuity, nor is it one whereof the husband's death is the "generating source". She owns her undivided one-half interest *ab initio*, and her ownership vested in her by the same title as that by which her husband acquired his interest and for the same consideration as that through which her husband acquired his interest.[24]. As expressed by Louisiana Civil Code, Article 2402:

> "The period of time (i. e. during marriage) when the purchase is made is alone attended to, and not the person who made the purchase."

5. In the *Tyler* and *Jacobs* case, the statute (there dealt with) was a means appropriate to the legitimate aim of Congress of preventing tax avoidance, in whole or in part, by *inter vivos* donation of the property of one to another. This was just a basis for the decisions, but it has not the remotest application to community partnership property.

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[24]Apparently, in an attempt to bring the amendment of 1942 within the reasoning of the *Tyler* and *Jacobs* cases, the writer of the statute inserted a provision seeking to except from the community property falling into the estate of a deceased spouse "such part thereof (i. e. of the community) as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the suviving spouse."

This provision certainly evinces an entire misconception of the law of Louisiana because "compensation for personal services actually rendered" falls into the community (Civil Code, Article 2402) regardless of whether such services be rendered by the husband or by the wife, living together as such. Argument for appellant based upon Article 2334 of the Civil Gode must be rejected in view of the decisions of the Supreme Court of Louisiana in *Houghton v. Hall*, 177 La. 238. *Succession of Manning*, 107 La. 456; *Gastauer v. Gastauer*, 143 La. 749; *Hellberg v. Hyland*, 168 La. 493; *Ford v. Brooks*, 35 La. Ann. 157.

Moreover, where separate property of the surviving spouse has been used for the benefit of the community, that into which it has been converted is community property, leaving its former owner merely a creditor of the community at its dissolution: "It is well settled that where the separate funds of one spouse have been invested in property for the community or otherwise expended for the benefit of the community, such spouse becomes a creditor of the community to that extent." *Succession of Merrick*, 35 La. Ann. 296; *Gee v. Thompson*, 41 La. Ann. 351; *Sharp v. Zeller*, 110 La. 61, 72; *Succession of Watkins*, 156 La. 1000, 1004; *Succession of Goll*, 156 La. 916.

Nor is *Moffitt v. Kelly*, 218 U.S. 400, relied on by the Solicitor General, in anywise controlling. There the issue was the validity under the Fourteenth Amendment of an inheritance tax statute of California as applied to the assessment of a tax against the interest of a surviving widow in community property.

It should be observed that the law under consideration was a State (succession), not a Federal (estate tax) statute; and that the case arose at a time when the law of California fell far short of being a community system of the type that has always prevailed in Louisiana, and is now prevailing in California. At that time, as the decisions of this Court, in the *Robbins* (269 U.S. 315) and *Malcolm*, (282 U.S. 792) cases, and of the 9th Circuit Court in *Wardell v. Blum*, (276 Fed. 226)[25] show, it was well settled that the wife had no real ownership in one-half of the property. She had an expectancy only, and this expectancy was "vested" merely in the sense that the husband could not disinherit her. But the wife was not an equal owner with the husband, and she had no power of testamentary disposition over any part of the community property if she died first. The property was the husband's whether she lived or died, subject only to the provision that he must leave her one-half at his death. The *Moffitt* case, therefore, does not in any manner sanction or approve a statute of the kind here under consideration. The State inheritance tax law under consideration in the *Moffitt* case did not, as does the Federal Estate Tax Law here involved in this case, undertake

[25]Subsequent legislation changed the status of the wife *quoad* her interest in the community, so that the federal inheritance tax (at least, prior to the statute here in question) no longer applied to include the wife's interest in the valuation of the husband's estate. *Wardell v. Blum*, (CCA 9th) 276 Fed. 226, (*certiorari* denied 258 U.S. 618). And in the subsequent case of *United States v. Malcolm*, 282 U.S. 792, this Court recognized the controlling effect of the change in the local law in California, by applying to the incidence of the tax on community income the doctrine of *Poe v. Seaborn* and *Bender v. Pfaff*.

to treat the husband and wife as if each owned all of the property at the same time. It did not attempt to tax the first of the two spouses to die on the whole of the community partnership property. It did not make the tax depend on the sheer accident of which spouse died first. It did not provide for taxing the wife at her death on any part of her property, because under the California law, as it then was, the wife did not own any interest in the property and had no power of testamentary disposition over it. The California statute involved in the *Moffitt* case did not at one and the same time both recognize and deny the property rights of the two spouses. The statute did not create presumptions, contrary to law and to fact, that husband and wife at the same time each owned all of the identical property. Consequently, the *Moffitt* case in no wise puts the stamp of approval on a statute of the kind here under consideration. It is true that a dictum in the opinion states that the State could select, as the subject for taxes, the cessation of the possession and enjoyment of the property at the husband's death, even though under California law her expectancy was vested only in the sense that he could not disinherit her. But this does not mean that the Federal Government can select, as its subject for taxation, the bare cessation of management where ownership is vested in another, nor did the Court there so decide. There is a difference between the cessation of possession, use and enjoyment, i. e., a cessation of property interest, and a bare cessation of the management of property belonging to another. The *Moffitt* case certainly did not hold that Congress could make the bare cessation of the management of another's property the occasion for an estate tax.

That the statute involved in *Moffitt vs. Kelly* was a succession tax, and not an estate tax, was pointed out

in *In Re Miller's Estate*, 184 Calif. 678, 195 Pac. 415, 16 A.L.R. 694, and in *Stebbins v. Reily*, 268 U. S. 137, 143. Consequently, the utmost application that could be made of the *obiter* is that it dealt with the right of a state to impose a tax on the surviving wife, because of her having received a thing of value at the death of her husband. There was no question there of the imposition of an estate tax, i. e. one whereby the burden falls upon the widow and heirs of the decedent, measured both as to valuation and as to rates by the addition of what had been transferred by death of property never belonging to the decedent.

Moreover, the opinion of this Court in the *Moffitt* case should be read in connection with the opinion of the Supreme Court of California in the same case. *In re Moffitt's Estate*, (Cal.) 95 Pac. 653. The Inheritance Tax Law of California, quoted in the latter opinion, levied a tax upon "all property which shall pass by will or by the intestate laws of this state from any spouse who may die seized or possessed of the same". The wife's portion of the community estate was included as a part of the property of her deceased husband in computing inheritance taxes under this act. The question, and the only question, presented, therefore, was whether the interest of the wife in the community property passed "by will or by the intestate laws of this state from any person (the husband) who may die seized or possessed of the same." Upon this question the Supreme Court of California said:

> "After painstaking investigation and review, and after the fullest deliberation, this court in *Re Burdick* determined and held, as it declared in *Spreckels vs Spreckels*, that upon the death of the husband the wife takes one-half of the community property as heir. Every argument here ad-

vanced against the conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. * * * Thus the Legislature is presumed to have enacted it with full knowledge that this court *in banc*, not once, but repeatedly, have declared that the wife did take her share of the community property upon the death of her husband by succession as his heir."

Imposition of the tax was assailed in this Court upon two grounds: (1) violation of the contract clause; and (2) violation of the equal protection of the law clause in the Fourteenth Amendment. Substantially all of the Court's discussion of the case was under the first of these contentions. The language relied upon by the government in the present case was as follows: (218 U.S. pp. 403-404)

> "* * * The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, control the power of the States to select and classify subjects of taxation, and, hence, even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was, nevertheless, within the power of the State, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof."

The Court then stated that the taxpayer was contending that this holding did not dispose of the case because under the state law, rightly construed, the wife

owned a vested interest in the community property before the death of her husband and that she did not take as his heir. In answer to this contention the court asserted that it was concerned solely with the question of the power of the State to levy the tax upon the subject or thing taxed. It then added (p. 405):

> "To make this, if possible, clearer by an illustation we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that on an analysis of the constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Moffits, we should conclude that the nature and character of the rights of the wife in the community property, if correctly interpreted, were such that on the death of the husband the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration. This would be the case, **because as there was state power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely state question not involving any violation of the Constitution of the United States, and which therefore we have no right to review."** (Emphasis ours.)

In effect, therefore, this Court held in the *Moffitt* case that the subject matter covered by the California statute was a legitimate object of state taxation; that as the Supreme Court of California had held that the wife's interest in the community passed to her as heir of the husband, it could be legitimately taxed. The Court further stated, by way of *obiter*, that its view upon this question would be the same even if it were to conclude, by an independent investigation of the law of California,

that the wife owned an interest in the community not properly includible in the husband's estate, since this point was purely a state question upon which the decision of the Supreme Court of California would be binding and conclusive.

In its discussion in the *Moffitt* case of the taxpayer's second contention (violation of the Fourteenth Amendment) the Court after noting that the argument was based upon the premise that the wife had a vested interest which could not be subjected to the tax, disposed of the contention by saying: "The nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question which we have no power to review."

In effect, therefore, this Court did nothing more in the *Moffitt* case than to accept the decision of the Supreme Court of California as a final, binding adjudication as to the rights of the wife in community property in that state. That this is a correct interpretation of the opinion is evident from the opinion in *Coolidge v. Long*, 282 U.S. 582, 600, where this Court in referring to the case of *Moffitt v. Kelly* said:

> "The state court sustained the tax upon the wife's share in the community property. This court held that the nature and character of her right was a local question and that the tax was not violative of the contract clause of the Constitution or the due process or equal protection clause of the 14th Amendment."

The Court then points out that this "local question" had been considered and decided by this Court in *United States v. Robbins*, and there held to be one that had been settled as a rule of property in California by its highest court for more than sixty years.

Finally, in connection with the reliance of the Government on the excerpt first quoted from the *Moffitt* opinion, see the opinion of the Circuit Court of Appeals for the Ninth Circuit in *United States v. Goodyear,* 99 Fed. (2d) 523, cited *supra* p. 62.

Section 402 (b) Is Lacking in Geographic Uniformity

Not only does the statute, as amended by *Section* 402 (b) of the 1942 Act, violate due process, but it offends the Constitutional requirement that all excise taxes be uniform throughout the United States. (Article I, Sec. 8, Clause 1 of the Constitution). This uniformity provision refers to geographical and not to intrinsic uniformity. *State of Florida v. Mellon,* 273 U. S. 12; *Crooks v. Harrelson,* 282 U. S. 55; *Knowlton v. Moore,* 178 U. S. 41. It prohibits the "levying of duties imposed or excised upon a particular subject in one state, and a different duty imposed or excised on the same subject in another state," and it does require that **"whatever plan or method Congress adopts** for laying the tax in question, **the same plan or method must be made operative throughout the United States,"** and that **"wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."** *Knowlton v. Moore, supra.*

The 1942 Amendment does not make operative "the same plan" or "the same method * * * throughout the United States". It does not tax the same subject "everywhere throughout the United States".

The Federal Estate Tax Law is an excise on the privilege of passing property at death. *United States Trust Company v. Helvering,* 307 U. S. 57. *Landman v. Commissioner,* (CCA10) 123 Fed. (2d) 787. *Porter v. Commissioner,* 288 U. S. 436, 444. *Knowlton v. Moore,* 178 U. S. 41, 56.

By its general plan the tax is imposed "upon the transfer of the net estate of every decedent" (*Section* 810 *Internal Revenue Code*) and the property subject to the tax is limited "to the extent of the interest therein of the decedent at the time of his death." (*Section* 811 (a)). Thus, the plan is to impose a tax upon the "transfer" of property at death, measured by the value of the decedent's interest in such property.[26] The "subject" of the tax is this privilege of transfer by death. This was the subject of the tax in the community partnership property states until the passage of the amendment in question. This amendment, however, adopted a new plan and selected new subjects of taxation in the community partnership property states, leaving undisturbed the original plan and the original subjects of taxation in all other states.

The 1942 amendment, by its terms, is addressed only to community partnership property held "under the law" of the community partnership states. It has no op-

[26]The only exceptions to the plan of limiting the tax to property beneficially owned at death by the decedent are: (1) transfers in contemplation of or intended to take effect in possession or enjoyment at or after death, including transfer where possession, use, enjoyment or income is reserved for the decedent's lifetime (Sec. 811 (c).)

(2) Transfers where the decedent reserved power to amend or revoke a gift Sec. 811 (d). (3) Transfers by decedent to his wife or a third party of an estate by the entirety or joint tenancy (Sec. 811 (c). In each case the *inter vivos* transfer is specifically includible only if the decedent *originally owned* the property and he made or caused the transfer to be *made donatively and without consideration*.

And, in each case, the *inter vivos* transfer must be donative or testamentary in character (e. g., transfers in contemplation or to take effect at death) or such as would not serve finally to vest the property in possession or enjoyment until the transferor's death (e. g., joint estates with survivorship, revocable trusts). In each instance a specific statutory provision was enacted to prevent tax avoidance. These serve to emphasize the basic character of the tax as an excise on the privilege of passing property at death.

In the *Estate of Rogers v. Helvering*, 320 U. S. 410,413 Mr. Justice Frankfurter, speaking for the majority of the Court, said, "For the purpose of ascertaining the corpus on which an estate tax is to be assessed, what is decisive is what values were included in dispositions made by a decedent, values which but for such dispositions could not have existed."

erative effect in other states. It is apparent from the analysis that we have given above (pp. 95 *et seq.*) that the plan or method laid down for community partnership states is not the same as the plan or method prescribed for the rest of the Union. It is likewise apparent from the express terms of the statute that the subject of the tax is different in these states from the subject of the tax in the other states of the Union.

(a) In all other states the general plan of taxation is to tax the transfer of the decedent's interest in the property, that is, his ownership thereof at death. In the community partnership property states, ownership of property is entirely disregarded, and the decedent is taxed with respect to property which he never owned and which he could not transfer at death.

(b) It is only in the community partnership property states that significance is given to the origin of the property. In the other states, the fact that a decedent created wealth is not made the occasion for a tax if he did not own the property at his death.[27] But in the community partnership property states, the mere fact that the joint efforts of the spouses created the wealth is alone sufficient to tax the spouse first dying on the entire property, even though at such spouse's death he or she owned only half thereof.

(c) It is only in the community partnership property states that a presumption is adopted to the effect that a man and wife shall both be deemed at one and the same time to be the owner of all of the same property (i. e., that each is presumed to be the owner of the other's property), and that each is taxed on the other's proper-

[27]See preceding footnote.

ty, and the tax made to depend on the sheer accident of which spouse may happen to die first.

(d) It is only in the community partnership property states that a bare cessation of management over property administered for another is apparently made the occasion for the imposition of the tax. In the other states, the death of a partner, though he be the managing partner, does not result in the inclusion of his surviving partner's interest in his taxable estate. In the other states, the death of a trustee does not result in an estate tax on such trustee's estate measured by the beneficiary's property. But as to the community partnership property states, the statute provides that the managing partner of the connubial partnership may be taxed on the survivor's share, and the husband, as fiduciary, may be taxed at death on property merely managed by him for his wife.

(e) Not only is uniformity denied because property rights in the surviving spouse are subjected to the tax, while essentially identical rights in the surviving spouse in non-community property states go free; it is even more flagrantly denied in the respect that while denying reality to the wife's rights in those cases where conceding their substantiality would result in exemption, the statute concedes their substantiality where the concession results in additional taxation.

Thus, if the husband should die first, the full community partnership estate is, more often than not, made the measure of the tax, thereby disregarding entirely the wife's half interest in such property. But, where the wife dies first, at least her half interest, being the property of which she has the testamentary disposition, is subject to the tax. Thus the statute attaches consequence to ownership only when the concession results in increased taxa-

tion, but denies it in the converse case. In no other case, and in no other part of the Union, save in the community partnership property states, does the law concede or deny the existence of property rights solely for the reason that concession or denial enriches the Treasury in the particular case. In capriciously denying, or capriciously insisting upon the reality of the wife's interest according to the effect upon the revenue, the 1942 Act departs from the principle of uniformity, since the locale to which these discriminations are limited is the community partnership property states, and there are no comparable provisions applicable elsewhere.[28]

It is not contended that excises imposed by Congress must be of such a character that they actually produce revenue throughout the Union. The only requirement of the Constitution is that they must operate impartially wherever conditions are such as to bring them into effect. Thus, the rule of geographic uniformity does not prevent Congress from placing an excise tax upon tobacco, notwithstanding the fact that tobacco is grown in only a few states (*Edye v. Robertson*, 112 U. S. 580). But in the present case, it is not true that the subject matter of the tax is found only in certain states. On the contrary, it is true that there are comparable, even identical, legal relationships and situations elsewhere, which, because of the admitted and purposeful territorial limita-

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[28]Consider the case of domiciliaries of Louisiana moving to a common law state, (See pages 51-52), *supra*. That state will recognize the common ownership of their property, although their property is no longer "community property". At death they will each be taxed on his or her half only, whereas, if they remained in Louisiana, the whole would have been taxed to the first to die. A different rule of taxation is prescribed, therefore, with respect to the same persons and the same property merely because of the locale.

Consider also the case of domiciliaries of common law states where spouses are permitted to make contracts establishing community ownership as set forth on page 53. The Dominion of Canada Succession Duty Act makes no similar discrimination against spouses holding property under the community laws of the Province of Quebec.

tions of the Act, are not subjected to the tax, thus making geographic uniformity impossible.

As the Supreme Court of Louisiana pointed out, there is no substantial difference between the wife's interest in the community partnership and the interest of an ordinary member of a limited or special partnership. As this Court observed in *Poe v. Seaborn, supra,* "powers of partners or trustees of a spendthrift trust furnish apt analogies." There may be some formal and technical differences, but the question here is: Are these differences of such weight or importance that consequences so radically divergent may be applied to their transfer at death?[29] Clearly they are not.

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[29]To make the point vivid, consider, for example, an actual case arising since the Act of 1942 where the wife died first and *all* of the community was included by the taxing officers as a part of her gross estate, and a deficiency demanded on that account from her executor. These spouses, soon after marriage, purchased on credit a tract of land. This land immediately became community partnership property. They farmed it, each actually doing physical labor in planting and harvesting crops. They prospered, paid for the land, bought other lands, and ultimately accumulated a substantial estate, without either ever having at any time any separate property, and without either having received anything whatsoever as compensation for "personal services"; but each having made a substantial contribution in direct labor to the acquisition of each community asset. When the wife died, all property was taxed as a part of her gross estate; when the husband dies, one-half of the same property will again be taxed as a part of his estate.

To determine the geographic uniformity of this tax, contrast this tax with the tax which would have been levied had these spouses resided in a non-community property state and had they taken title to the properties acquired as tenants in common, or as partners. In neither case would be the estate of the spouse first to die have been required to pay a tax measured by more than one-half of the jointly owned property. Yet it is clearly not true that there would be any greater enhancement in the managerial or proprietary rights of the surviving spouse in the other one-half of the jointly owned property in the community partnership property state than there would be in the non-community property state. In short, the lesser increase in purely managerial rights, if in fact there is any increase at all, is made the occasion for an increase in tax liability solely because the owner and property are located in community partnership property states; while corresponding or greater increases in managerial and proprietary rights when the owner and property are located in non-community property states *are not made the occasion for any increases in tax liability.*

It is also significant that since in the above case, there was no *gift* of the property by the husband or wife involved, even if the property in question had been acquired by the husband and wife as "tenants by the entirety" in a common law state only one-half of the property would be taxed at the death of either spouse.

No Court has been more firm than this Court in insisting that taxation is a practical matter. (*Helvering v. Horst*, 311 U. S. 112). We are admonished that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed, — the actual benefit for which the tax is paid" (*Corliss v. Bowers*, 281 U. S. 376, 378 (1930); *Estate of Hanford v. Commissioner*, 308 U. S. 39, 43 (1939). See also *Helvering v. Clifford*, 309 U. S. 331 (1940); *Harrison v. Schaffner*, 312 U. S. 579 (1941); *Griffiths v. Helvering*, 308 U. S. 355 (1939)). The subject of death duties, as of gifts, has "come to be identified more nearly with a change of economic benefits than with technicalities of title" (*Burnet v. Guggenheim*, 228 U. S. 280, 287 (1933)). Unless "technical distinctions" (*Chase National Bank v. United States*, 278 U. S. 327, 336 (1929)), and "attentuated subtleties" (*Lucas v. Earl*, 281 U. S. 111, 114, (1930) are to be again raised to a regard from which they have fallen, it must be concluded that the 1942 Act operates in non-community property states with results which are vastly different from those which are attendant upon it in community partnership states, and are discriminatory against the latter. To maintain this result is to place reliance upon "elusive and subtle casuistries" possessing "no relevance for tax purposes", which are presently — and rightly — in such ill repute (*Helvering v. Hallock*, 309 U. S. 106 (1940)).

The Committee reports state that, in adopting the 1942 amendment to the Estate Tax Law, the Congress was attempting to remove what it deemed to be an undue advantage enjoyed by residents of community partnership states. If it was the Congress' aim to place the community property states on an equality with the common law states, the statute in question is wide of the mark.

Far from equalizing the tax, Congress has seriously discriminated against the community property states as we have shown and has made the burden of estate taxes much heavier in those states than in other states.[30] In any event, with deference, we submit that the Committee seemed to be unaware of the real nature of the community partnership and substantially similar legal relationships in other state. An advantage for tax purposes presupposes that certain individuals or legal relationships are selected and given more favorable treatment than that accorded substantially identical relationships or individuals similarly situated. It is not discrimination to tax one more than another if one actually owns more than the other. Husbands and wives in the community partnership states whom the local law makes partners are not in the same situation with regard to property rights as husbands and wives generally in other states who are not partners. The fundamental and practical features of the community partnership law, previously enumerated in our summary, (pp. 13-18, *supra*) show clearly that the community partnership between husband and wife is in no sense a theory, but is in substance a partnership imposed by law which is unknown in the case of property rights of husbands and

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[30] For example, a man in New York accumulates during marriage a net estate of $1,000,000 and dies leaving a typical will whereby his wife receives the income from his estate for her life with remainder to his children. His estate tax is $325,700.00. At his wife's later death, her life estate terminates and no tax is payable when the property passes to the children. Contrast this with the Louisiana citizen who accumulates the same amount and dies leaving the same will. Under the 1942 Amendment he will pay the same tax at his death as the citizen of New York, but since his will passes only his half interest, his wife at her later death must pay an estate tax on her half which amounts to approximately $140,000.00. These two spouses in Louisiana pay together $465,000.00 or nearly 50% more that the New York spouses pay. Similarly, if in the same illustration, the wife of the New Yorker died first there would be no tax but her husband would pay $325,700.00 at his later death. If the Louisiana wife died she would pay $325,700 as against zero for the New York wife, and her husband must pay an additional $140,000.00 at his later death. Again they pay nearly 50% more than the New York couple.

wives in common law states. This partnership imposed by the Louisiana statutes creates burdens and limitations, as well as privileges, in relation to property rights of husbands and wives. The limitations upon the husband's property rights and the rights given to wives in community partnership states constitute practical disabilities and disadvantages which are unknown in common law states, so far as husbands and wives are concerned, and these practical burdens outweigh any "so-called" tax advantage. The same argument was made by the Government in support of the Commissioner's ruling in the income tax test cases, namely that to tax the husband on the wife's share of the community partnership income, would bring about uniformity and remove an advantage enjoyed by the community partnership states. This Court rejected this contention in *Poe vs. Seaborn, supra*, saying: (p. 117)

> "Finally the argument is pressed upon us that the Commissioner's ruling will work uniformity of incidence and operation of the tax in the various states, while the view urged by the taxpayer will make the tax fall unevenly upon married people. This argument cuts both ways. When it is remembered that a wife's earnings are a part of the community property equally with her husband's, it may well seem to those who live in states where a wife's earnings are her own, that it would not tend to promote uniformity to tax the husband on her earnings as part of his income."

The real test of discrimination is a comparison between how marital partners are taxed in community property partnership states and how special or limited partners are taxed in other states. When this test is applied, it clearly appears that the 1942 Amend-

ment did not remove, but actually created, discrimination based only on geographic location.[31]

In the last analysis, every complaint of discrimination and special privilege addressed to the recognition of community partnership property for tax purposes originates from the conception, wholly erroneous, that the systems of marital property rights prevailing in non-community property states are superior to community partnership systems, are more intrinsically just, are more in line with general conceptions of ownership and property rights. These critics take the view that the smaller number of States should conform their systems of marital property rights to the systems prevailing in the larger number of States. This does not have the merit of a national system. It involves no concessions from the States in the majority, but only a surrender of rights by the minority.[32]

Since the adoption of the Federal Constitution there has been a constant change in the marital property sys-

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[31]The so-called tax privileges which prior to the Amendment of 1942 were enjoyed by the husband and wife who had contracted a marital partnership in community partnership states are now enjoyed by and will continue to be enjoyed by all persons occupying the substantially analogous legal relationships in other States, because the 1942 Amendment is only applicable to the community partnership states. For example, husbands and wives in many common law states may by contract voluntarily form a partnership substantially similar to the community partnership. In most states, the husband, by donating half of his property to his wife, and obtaining an appointment from the wife as managing agent of her property, may bring about a legal relationship with regard to marital property similar to the community partnership. See note 16, *supra*.

A spendthrift trustee and the beneficiary or beneficiaries of such a trust is a common law legal relationship substantially similar to the community partnership relationship. The ordinary limited partnership with a managing partner is another example. See *Poe v. Seaborn*, *supra*.

[32]This view has the further vice of looking only at so-called benefits and disregarding burdens. See the rights of the wife in community property summarized at pp. 12 to 20, *supra*. As to comparative justness, we merely repeat the community property view—even though entirely non-commercial, the wife's activities merit as much economic reward as do the husband's commercial activities. She is entitled to her rights—these are not gratuities.

tems in force in most of the States. Perhaps all of the original thirteen states at an early date had the old common law concept of marital rights, the merging of the wife's identity with that of the husband and his acquisition upon marriage of all of the property which she then owned and all of the fruits of any activity in which she might thereafter engage. The necessary result of this system was to build up the estate of the husband. Everything was his, including his wife. Every departure from this ancient concept was in the direction of increasing the wife's property rights:—her right to continue to own the property which belonged to her at marriage; her right to profit individually by her own efforts and activities; and her right to manage her property and the fruits of her effort. Every such statutory change diminished the property of which the husband might die possessed; consequently, it diminished the tax which could be levied upon his estate. These statutory changes came at different times in different states. In common law or code states there have been, and there no doubt are today, substantial variations in marital property systems. If a man and wife are domiciled in South Carolina there may be a substantial difference in their rights to property acquired during the existence of the marriage from the rights of another man and wife acquiring property from similar sources while domiciled in Wisconsin. Is it discrimination or an unfair privilege, or estate tax advantage, to recognize those different marital property systems in determining the incidence of taxation? No one will so contend. Yet, there is or may be the same difference in marital rights and tax incidence in these cases as exists between the community partnership states and other states. If, for example, New York should decide to revert to the ancient common law doctrine, would it be discriminated against

because the Federal Government, having nothing to do with its decision so to revert to that system, gave effect thereto in determining the incidence of the Federal Estate Tax upon citizens of New York?[33] The same answer must be given to every assertion that citizens of community partnership states enjoy special privileges or tax advantages. Likewise, every failure to measure the tax by ownership results, not in removing an assumed advantage, but in gross discrimination and an unconstitutional lack of uniformity.

The short answer to all of the claims of special privilege is that neither Congress nor any other branch of the Federal Government has any power or right over the marital property systems in force in the various states, and, where these systems have a bearing upon the incidence of a federal tax, the extreme limit to which any branch of the Federal Government can or should go is to examine them as they are construed and applied by state courts to determine whether they are real and whether, tested by basic concepts of ownership, the one declared by state law to be the owner of property is actually such. When this determination is made, the incidence of the tax is controlled thereby and that this incidence may differ in the different states is no tax advantage.

Since the law of each state must determine questions of ownership, it is apparent that it is not possible to obtain identical practical results from the operation of the Federal revenue laws in each of the forty-eight states of the Union, unless Congress wishes to do violence

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[33]Differing rules as to the ownership of earnings of minor children furnish another example of difference in tax results which constitute no legal discrimination. Cf. the California law depriving parents of all, or part, of their children's earnings. (California Civil Code Sec. 361, 362.)

to the dual character of our Government and the historic and settled principle that the Federal Government must recognize marital rights and the ownership of property as defined and created by local state laws in the various states.

Congress has no power to legislate on domestic relations, proprietary interest in property or the origin of ownership, as these questions are exclusively within the powers of the States. *Ohio v. Agler*, 280 U.S. 379, 74 L. Ed. 489; *Smith v. Alabama*, 124 U.S. 465. To the extent that the 1942 statute undertakes to create property interests not recognized by state law, it violates these fundamental principles and strikes at the very root of our dual system of government. *McCullough v. Maryland*, 4 *Wheat.* 316-437, 4 L. Ed. 579, *Slaughter House Cases*, 16 Wall 36-130.

It is, on the other hand, the peculiar and special province of the states to enact legislation which will make for stability of the family and encourage family life. In the exercise of this province, certain of the states, long before the adoption of any federal income or estate tax laws, have seen fit through community partnership laws, as Louisiana has always done since the first European set foot on her soil, to invest husbands and wives with a community or partnership of interest in the business and financial transactions of each other, as well as in their social and personal relationships. This constitutes a valuable advance in the recognition of women's rights and in social progress. It gives, particularly to the wife, a position of security and a just, direct and vested ownership in the financial gains resulting from the endeavors of her husband and herself. It invests the wife with the status of equality; and emancipates her from the limitations and status of inferiority to which she

was subjected under the ancient common law principles. It enables the wife to maintain her self respect as a human being with equality with her husband and thus eliminates the irritation which otherwise may arise between those essentially equal but occupying positions of dominance or subservience.

The community partnership property system ministers to the success of family life. It is only natural that a wife who has a vested community ownership in the earnings of her husband may be expected to take a greater interest and cooperate with more enthusiasm in the activities in which her husband may be engaged than will a wife who is by law made inferior and dependent upon her husband's generosity. Moreover, the wife whether she serves in the homes or in her husband's business, or both, is in fairness entitled to equal treatment and equal property rights. These are the concepts which underlie the community property system.

The policies of the various states which have adopted the community partnership system, involving the recognition of these progressive concepts and the attempt to establish a better plan of marital relations in their respective states, are justly deserving of encouragement and support. At least such states should not be thwarted or embarrassed in the adoption and administration of such policies by any legislation of the Federal Government, which will render less effective the community property partnership system, or deny to the members of the marital partnership the full benefits and enjoyment of the rights thus established.

It is of the utmost importance that federal legislation shall not entrench upon this critically important field of state action or impede the states in the pursuit of this evolution in social progress. The fundamental im-

portance of the family as the basic unit of the social structure of our nation has long been recognized and clearly established.

It certainly is not and should not be within the constitutional authority of the Federal Government to adopt or enforce legislation which will discourage or indirectly annul or invalidate in any manner whatsoever the legal effect of statutes of the states serving the purpose of social advancement in connection with a question of such vital domestic importance.

The Treasury Department, which sponsored the Estate Tax Amendment, seems to feel that uniformity is desirable. It is obvious that mathematical uniformity cannot be obtained by having Congress, in the form of a discriminatory legislative act, **disregard the fundamental laws of some states of the Union, and at the same time, recognize the local law of all of the other states of the Union as a guide and basis for the application of the Federal Estate Tax Law.** If the Government desires to tax the separately owned property and estates of both husband and wife as a whole and as a unit, it is not constitutional or fair to attempt to bring about this result by legislatives *fiat* in only a few selected states of the Union. If identical mathematical uniformity is sought to be accomplished, the Treasury Department should try to persuade Congress to attempt to tax the separate property and estates of husbands and wives as a unit in all the States of the Union. Insofar as husbands and wives are concerned, such a law would be uniform in its application in every state of the Union. This procedure, however, would only remove one of the objections to the present estate tax amendment, namely, that it arbitrarily and unfairly disregards the property rights of the community partnership property states and dis-

criminates against these States in calculating the Federal Estate Tax. If such a suggestion were adopted, and the Federal Estate Tax Law attempted to impose a Federal Estate Tax based on all of the property of both husband and wife in every state in the Union, regardless of which spouse died first, such a law would still be arbitrary and unfair as a gross discrimination against married people in favor of single people and would, of course, be an arbitrary, confiscatory and unconstitutional attempt to measure the tax of one person by the property of another. Until and unless the Federal Government is given and exercises power to regulate marital property and other local matters, any Federal Tax Act which does not recognize actual ownership, as fixed by state law, will be invalid.

Respectfully submitted,

SIDNEY L. HEROLD,
CHARLES E. DUNBAR, JR.

APPENDIX A

FEDERAL STATUTES

Revenue Act of 1942

"Sec. 401. **Estates to which Amendments Applicable.** Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to estates of decedents dying after the date of the enactment of this Act."

"Sec. 402. **Community Interests.**

(a) **Transfers of Community Property in Contemplation of Death, etc.**—Section 811 (d) (relating to revocable transfers) is amended by adding at the end thereof the following new paragraph:

'(5) Transfers of community property in contemplation of death, etc.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.'

"(b) General Rule—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out '(e) Joint Interests.—' and inserting in lieu thereof

'(e) Joint and Community Interests.—

'(1) Joint interests.—'.

(2) By inserting at the end thereof the following new paragraph:.

'(2) Community interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.' "

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"Sec. 404. **Proceeds of Life Insurance.**

"(a) General Rule.—Section 811 (g) (relating to life insurance) is amended to read as follows:

'(g) Proceeds of Life Insurance.—

'(1) **Receivable by the executor.**—To the extent of the amount receivable by the executor as insurance under policies **upon the life of the decedent.**

'(2) **Receivable by other beneficiaries.**—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in con-

junction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include a reversionary interest.

'(3) **Transfer not a gift.**—The amount receivable under a policy of insurance transferred, by assignment or otherwise, by the decedent shall not be includible under paragraph (2) (A) if the transfer did not constitute a gift, in whole or in part, under Chapter 4, or, in case the transfer was made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such chapter had it been in effect at such time.

'(4) **Community property.**—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community.'

"(b) **Liability of Life Insurance Beneficiaries.**—Section 826 (c) (relating to apportionment of liability of beneficiaries) is amended to read as follows:

'(c) **Liability of Life Insurance Beneficiaries. Unless the decedent directs otherwise in his will,** if any part of the gross estate **upon which tax has been paid** consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to **the sum** of the net estate **and the amount of the exemption allowed in computing the net estate, determined under section 935 (c).** If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.'

"(c) **Decedents to Which Amendments Applicable.**—The amendments made by subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

"Sec. 407 **Deduction on Account of Property Previously Taxed.**

"(a) **Amendments to Internal Revenue Code Provisions Relating to Property Previously Taxed.**—

"(1) The first paragraph of section 812 (c) is amended to read as follows:

"(c) **Property Previously Taxed.**—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent; or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. **Property includible in the gross estate of the prior decedent under section 811 (f) and property included in total gifts of the donor under section 1000 (c) received by the decedent described in this subsection shall, for the purposes of this subsection, be considered a bequest of such prior decedent or gift of such donor.** This deduction shall be allowed only where a gift tax imposed under Chapter 4, or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this **chapter** or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this **subsection, section 861 (a) (2), or the corresponding provisions of any prior Act of Congress,** in respect of the property or property given in exchange therefor.'"

"Sec 411. **Liability of Certain Transferees.**

"(a) **Imposition of Liability.**—Section 827 (b) is amended to read as follows:

'(b) **Liability of Transferee, etc.**—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a *bona fide* purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in Section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a *bona fide* purchaser for an adequate and full consideration in money or money's worth.'

"(b) **Definition of Transferee.**—Section 900 (e) is amended to read as follows:

'(e) **Definition of 'Transferee.'**—As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee, **and includes a person who, under section 827 (b),** is personally liable for any part of the tax."

"Sec. 451. **Gifts to Which Amendments Applicable.** Except as otherwise expressly provided,

the amendments made by this Part shall be applicable only with respect to gifts made in the calendar year 1943, and succeeding calendar years."

"Sec. 453. **Gifts of Community Property.** Section 1000 (relating to tax on gifts) is amended by inserting at the end thereof the following new subsection:

'(d) **Community Property.**—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that ~~gifts of~~ such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.' "

Internal Revenue Code:

"Sec. 810. **Rate of Tax.** A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. * * *."

"Sec. 811. **Gross Estate.** The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States"—

"Sec. 811 (a) **Decedent's Interest.**—To the extent of the interest therein of the decedent at the time of his death;"

"Sec. 811 (e)

"(e) **Joint Interests.**—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: **Provided,** That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: **Provided further,** That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants."

"Sec. 812 **Net Estate.** For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate"—

"Sec. 812 (b)

"(b) **Expenses, Losses, Indebtedness, and Taxes.**
—Such amounts—

"(1) for funeral expenses,

"(2) for administration expenses,

"(3) for claims against the estate,

"(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, and

"(5) Reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered. * * * * * * * . For the purposes of this section the term 'property subject to claims' means property includible in the gross estate of the decedent which, or the avails of which, would, under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement of the estate; and, for the purposes of this definition, the value of the property shall be reduced by the amount of the deduction under the next sentence attributable to such property. * * * * * * *"

"Sec. 812 (c)

"(c) **Property Previously Taxed.** An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. * * *."

"Sec. 826 (b)

"(b) **Reimbursement Out of Estate.** If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interests in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

"Sec. 826 (c)

"(c) **Liability of Life Insurance Beneficiaries.** Unless the decedent directs otherwise in his will, if any part of the gross estate upon which tax has been paid consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935 (c). If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio."

"Sec. 113. **Adjusted Basis for Determining Gain or Loss.**

"(a) **Basis (Unadjusted) of Property.** The

basis of property shall be the cost of such property; except that—

"(5) **Property Transmitted at Death.** If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *."

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Art. 2405. Community presumed on dissolution of marriage. At the time of the dissoultion of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

Art. 2402. Property forming community – Personal injuries to wife. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." (As amended, Act 1902, No. 68.)

Art. 2403. Community and individual debts. - In the

same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

Art. 2406. - Dissolution of Marriage - Division of community. - The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

Art. 2409. – Debts contracted during marriage – Liability. – It is understood that, in the partition of the effects of the partnership or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

Art. 2404. – Husband master of community – Gratuitous and fraudulent conveyances. — The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage.

A gratuitous title within the contemplation of the article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud. (As amended, Act. 1926, No. 96.)

Art. 2385. Wife failing to administer paraphernal property—Management by husband.—The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

Art. 2386. Fruits of paraphernal property—Ownership.—When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands; but the fruits and revenues, which are existing at the dissolution of the marriage, belong to the owner of the things which produced them. (As amended, Acts 1871, No. 87. This article has been amended by Act 286 of 1944 but such amendment was adopted subsequent to the decedent's death in this case).

Art. 2399. Community of acquets and gains—Stipulation against required.—Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

Art. 2329. Alteration of agreement after marriage

prohibited—Couples removing into state—Contracts.— Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of marriage; but it can not be altered after the celebration. Provided that in the case of married couples removing to this State and settling therein from other States and countries after marriage, they shall have the right at any time within one year after the passage of this act, or a like period after such settlement in this State, to make a valid marriage contract, subject in all other respects to the laws of this State. (As amended, Act. 1910, No. 236.)

Art. 2332. Community of acquets or gains – Modification or abrogation by agreement – The partnership, or community of acquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

Art. 2425. Wife's right to petition for separation of property—The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to the mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims. (See appendix B)

Art. 2430 — The wife, who has obtained the separation of property, may, nevertheless, accept the partnership or community of gains, which has existed till that time, if it be her interest so to do, and upon her contributing, in case of acceptance, to pay the common debts.

She retakes, also, her dowry and all she brought in marriage, or which she acquired separately during the marriage by inheritance or otherwise.

Art. 2433 — The personal creditors of the wife cannot, without her consent, petition for a separation of property between her and her husband.

Nevertheless, in case of the failure or discomfiture of the husband, they may exercise the rights of their debtor to the amount of their credits.

Art. 496 — Ownership and possession distinguished — The ownership and the possession of a thing are entirely distinct.

The right of ownership exists independently of the exercise of it. * * *.

Art. 64 — The husband or wife of the absentee, who is not separated in estate from him or her, and who wishes to continue to enjoy the benefit of the community or partnership of matrimonial gains, which existed between them, may prevent the provisional possession or exercise of all the rights which may depend upon the death of the absentee, and claim and preserve for himself or herself in preference to any other person, the administration of the estate of his or her absent husband or wife.

If on the contrary the husband or wife of the absentee chooses rather to have the community dissolved, he or she may exercise and claim all his or her rights, both legal and conventional, on his or her giving security for such things as may be liable to be restored.

The wife who elects to have the community continued, has, notwithstanding, the right of renouncing it afterwards.

Art. 123 — The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains.

Art. 159 — The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony, between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them.

APPENDIX B

RIGHT OF THE WIFE TO A SEPARATION OF PROPERTY AND A DISSOLUTION OF THE COMMUNITY PARTNERSHIP

The Louisiana Supreme Court, as far back as 1844, in *Davock v. Darcy*, 6 Rob. 342, in interpreting Louisiana Civil Code Article 2425, held that the right of the wife to sue for a separation of property and a dissolution of the community partnership was not limited to the cases mentioned in Article 2425. The argument was made in the cited case "that a wife who had brought no dowry and has no rights and claims to exercise against her husband" could not obtain a separation of property within the meaning of Article 2425. The court rejected the contention as "giving to the Code too narrow a construction." In the *Davock* case the court was considering a set of facts in which the wife did not have **dowry or separate claims to assert or protect**, circumstances which it was contended were required by the language of the codal article as a condition for the bringing of the suit. The court nevertheless granted the decree of separation of property and a dissolution of the community partnership in order to protect the wife's earnings which, unless a separation of property was granted, would have fallen into the community partnership and would have been jeopardized by the insolvency of the community partnership and the disorder of the husband's affairs. The

rule of the *Davock* case, which reads out of the Code the apparent requirement that the wife have dowry or separate claims against her husband as a condition to the right to claim a separation of property and a dissolution of the community partnership, has been consistently applied and followed by all of the subsequent cases in which the point has been presented to the Supreme Court of Louisiana. *Wolfe & Clark v. Lowry*, 10 La. Ann. 272; *Mock v. Kennedy*, 11 La. Ann. 525; *Webb v. Bell*, 24 La. Ann. 75; *Vickers v. Block*, 31 La. Ann. 672; *Gastauer v. Gastauer*, 131 La. 1; *Carite v. Trotot*, 105 U.S. 75; *Jones v. Jones*, 119 La. 677; *Larose v. Naquin*, 150 La. 353 at 358; *Holmes v. Barbin*, 15 La. Ann 553 (1860).[1] As far back as 1855, in *Wolfe & Clark v. Lowry*, 10 La. Ann. 272, after referring to the long line of decisions restating the rule in the *Davock* case that the right of the wife to a separation of property and a disoslution of the community partnership was not limited to the cases mentioned in Article 2425 of the Civil Code, the Supreme Court of Louisiana said: "After these repeated decisions, we must consider the law as settled, the question being one of the construction of statutory law, involving no fundamental principles."

The Louisiana Supreme Court later held, in *Webb v. Bell*, 24 La. Ann. 75 (1872), that even though the wife was not engaged in any lucrative undertaking and there was no existing interest in the community partnership to protect at the time of the suit, the wife would nevertheless be given a judgment of separation because of the possibility of her having future earnings or of her acquiring property in the future which would fall into the community partnership and which should be protected.

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[1]The holdings of the Louisiana Supreme Court are in exact accord with the French doctrine, under an article identical with the article of the Louisiana Code.

In *Chaffe & Sons v. Watts*, 27 La. Ann. 324, decided in 1885 the Supreme Court of Louisiana said:

> "One of the most beneficent objects of the laws authorizing separation of property is to emancipate not only the property, but also the industry, of the wife from control of an insolvent husband and to enable her to earn a livelihood for herself and family free from his debts and embarrassment."

The court, in referring to "one of the beneficent objects" of a separation of property and a dissolution of the community partnership, was describing a case where the husband was insolvent and his affairs were in disorder. The reason for the rule and the principle stated, however, would have had equal application if the husband had been a "bad manager" and the wife's one-half ownership in the community partnership was thereby endangered. The rule established by the court would logically have equally supported a statement that "one of the most beneficent objects of the law authorizing a separation of property and dissolution of the community partnership is to protect the wife's present and future property interests from the danger and damages of the husband's mismanagement and fraud."

In the earlier cases the action was usually brought when, because of the husband's bad management, the husband's affairs were in disorder and the community partnership debts exceeded the community property assets and when there was, in fact, no residual half interest of the wife in the community partnership to protect. The dissolution of the community partnership was decreed in these cases to protect the wife in the event that she should have future earnings or acquired property in the future that would fall into the community partnership.

These cases certainly do not justify an inference, as the Solicitor General suggests, that a different result would have been reached if the community partnership had been solvent. As a matter of fact, if the possibility of the wife's having future earnings, which would become community partnership property and be subject to the husband's mismanagement, and if the protection of this property from the husband's mismanagement or from the insolvency of the community partnership, would justify a separation and a dissolution of the community partnership, then *a fortiori*, a wife would be entitled to a separation of property and to a dissolution of the community partnership if the community partnership was not yet insolvent and if the wife's interest in one-half of the community property assets was being jeopardized and needed protection. This construction is in line with the meaning and philosophy of the Louisiana jurisprudence on the subject and when this rule was again clearly stated in the *Wiener* case no enlarged construction of the earlier cases was involved.

As a matter of fact, the Louisiana Supreme Court in *Gastauer v. Gastauer*, 131 La. 1, following the *Davock* case, clearly indicated that a separation of property and a dissolution of the community would be decreed when the community partnership property was involved. In that case there was an allegation that the action for separation of property was for the purpose of protecting the wife's separate property. The court found, however, that the property in question was not separate property but community partnership property. But the court nevertheless held that the wife was entitled to a separation of property, evidently for the purpose of protecting both her existing one-half interest in the community partnership and her future earnings or acquisitions.

The Louisiana decisions make clear that the wife is entitled to a separation of property and to a dissolution of the community partnership, if her property interests are endangered or jeopardized, regardless of whether the property interests consist of her dowry and separate claims or her existing one-half interest in the community partnership property or her future earnings or acquisitions.

Now, the danger and damage to any or all of the wife's property interests against which the wife is protected by the judgment of separation of property and a dissolution of the community partnership, is the danger and damage resulting from either (a) **"mismanagement or otherwise"** or (b) **"the disorder of his affairs"**. Louisiana Civil Code Article 2425 expressly describes these two grounds for a separation of property and separates the description of these two grounds with the disjunction "or." It is clear, therefore, that if either ground is alleged and proved, the wife, according to the express language of Article 2425, is entitled to a judgment of separation of property and to a dissolution and liquidation of the community partnership. Article 2425 provides that the wife may, during the marriage, petition for a separation of property on two grounds, one of which, according to the language of the article, is "owing to the mismanagement of her husband, or otherwise * * *". These words "mismanagement or otherwise" as defined in and developed by the Louisiana jurisprudence interpreting the article have been given a well defined meaning.

Since Louisiana Civil Code Article 2404 expressly prohibits the husband from disposing of the community partnership property in fraud of his wife's rights, and since a fraudulent disposition of property by an

agent or manager constitutes the grossest kind of mismanagement, then, *a fortiori* the handling or disposing of the community partnership property in fraud of the wife's rights is "mismanagement" as defined by the Code. It certainly is not a strange or enlarged construction of Article 2425, read in the light of Article 2404 and the prior jurisprudence of Louisiana, for the Supreme Court of Louisiana to say that fraudulent management is "mismanagement," and if proved will justify a separation of property and a dissolution of the community partnership. Other cases cited elsewhere in this brief make clear that the husband must account for and reimburse the wife for her one-half of any community partnership assets handled or disposed of in fraud of her property rights as a partner.

The Supreme Court of Louisiana in *Larose v. Naquin*, 150 La. 353 (1921) approved the statement in *Jones v. Jones*, 119 La. 677 (1907), that the wife might invoke the remedy of a separation of property upon proof that the husband was of a *speculative disposition* and was daily incurring debts. It is also significant that the court in the *Larose* case, referring to the *Jones* case, said:

> "The wife in that case had based her suit for separation upon two grounds, either of which would have been sufficient if supported by proper evidence: (1) That her husband was of a speculative disposition, and was daily incurring heavy indebtedness in buildings and improvements and extensive planting, which she feared might prove disastrous and thereby endanger any future acquisitions of hers; and (2) that she was his creditor for paraphernal funds received by her, * * *." (Emphasis ours)

It is clear that the Louisiana supreme court an-

nounced in the above case that the wife was entitled to a separation of property and to a dissolution of the community partnership if the husband as manager of the community partnership was of a "speculative disposition and was daily incurring debts." The court was thus defining a form of mismanagement and interpreting the words "Mismanagement or otherwise" in the Code. If the court did not consider the husband as an agent or fiduciary it would not have stated, in substance, as far back as 1921, that a husband having a "speculative disposition" was a bad manager of the community partnership. If the facts as to mismanagement or fraud are alleged and proved and if the community partnership is not already insolvent and there is a liquidating interest available to the wife, the action for separation of property is given to the wife both for the protection of her undivided half interest remaining in the community partnership and for the protection of her future earnings or acquisitions. There is nothing difficult or strange in this construction of the wife's rights and the limitations on the husband as agent or manager, in the light of the purpose and philosophy of the rule announced in the prior decisions of the Louisiana Supreme Court.

In defining and appraising the meaning of both negligent and fraudulent mismanagement, the Louisiana Supreme Court necessarily and properly interpreted the words "mismanagement" and "fraud," as used in our codal articles, as they are ordinarily described and applied to the obligations and duties of agents, managing partners and other fiduciaries in common law states. The Louisiana Supreme Court in the *Wiener* case did not enlarge, but merely summarized and restated, the principles and philosophy of the Louisiana codal articles and the rules established by the jurisprudence of the state, when it said:

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"It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital relationship, the framers of our law and its codifiers saw fit, in their wisdom, to place the husband at the head of the partnership, but this did not in any way affect the status of the property or the wife's ownership of her half thereof. * * * The community partnership had to be placed in charge of a managing partner for very expeditious and necessary reasons — dealings with third parties with respect to the community property had to be protected from the nullifying actions of the other spouse; the confusion ensuing from dual control had to be avoided. And the husband was made the managing partner of the community and charged with the administration of its affects, as well as with the alienation of its effects and revenues by onerous title, because he was deemed the best qualified to act.

"But the redactors of our law did not neglect to hedge the wife's interest in the community property with protecting rights. They subjected the husband's powers to various substantial checks and limitations corresponding to those imposed upon any managing partner or agent and provided for the wife's right to assert such limitations. * * * The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community partnership whenever her husband proves to be incompetent, a bad manager, of a reckless or speculative disposition, or whenever his affairs are in such disorder that her property rights are jeopardized. * * *"

APPENDIX C

LEGISLATIVE AND JUDICIAL HISTORY OF THE COMMUNITY PROPERTY CONTROVERSY

Following an earlier opinion applicable only to Texas rendered in 1920, the Attorney General of the United States, on February 26, 1921, rendered an opinion which was promulgated by the Commissioner of Internal Revenue as Treasury Decision 3138 on March 3, 1921, based on an exhaustive study of the laws of all the community property states. In these opinions, the Treasury Department announced that in Louisiana, Texas, Arizona, New Mexico, Idaho, Nevada and Washington, all of which are community property states, the wife, as a partner in community, was the vested and real owner of one-half of all of the community property including the income derived from such property, and that since all community partnership income belonged equally to husband and wife, one-half of such income should be returned separately for income tax purposes by each spouse. (California was excepted from the ruling in 1921. Subsequent changes in the community property law of California have resulted in the Government recognizing the same right of husbands and wives in California since 1930).

In 1921, 1924, 1934, 1940 and 1942, attempts were made in Congress to amend the Revenue Act, which amendments were designed to compel the husband in community partnership states to include in his individual income tax return the half of the community income which belonged to his wife under the local state law. In 1921 and again in 1924, 1934 and 1940 oral arguments were made before the Committee on Ways and Means and briefs were filed with the Committee in behalf of the community partnership states in 1921, 1924 and 1934, showing

that the proposed amendments were grossly discriminatory and unjust, and, as a result, the amendments were rejected by Congress. (Vol. 61, Congressional Record, No. 146, for November 3, 1921, pp. 8037, 8038; Report of hearings, before Committee on Ways and Means, House Reports, Revenue Division, 1924, pp. 194, 348, 375 to 482, inclusive). Similar amendments were twice defeated on the floor of the Senate after an exhaustive debate.

When the sponsors of the legislation in 1921 and again in 1924 failed to persuade Congress to ignore the laws of the community partnership states and to compel by legislative fiat the husband to pay taxes on his wife's half of the community partnership income, efforts were then made to change the rulings of the Treasury Department and of the Attorney General which had been in effect for many years. Following the decision of the Supreme Court in *U. S. vs. Robbins*, 269 U. S. 315, dealing with the law of California, the Treasury Department finally decided to institute test suits in some of the other community partnership states, so that this Court might decide the matter. In 1930 this Court unanimously decided that the prior rulings of the Attorney General and Treasury Department were correct and accordingly, that in the States of Louisiana, Washington, Texas and Arizona the wife had a legal and real ownership in half of the community partnership property and the ***partnership*** income arising therefrom and the right of husbands and wives in those states to make separate returns of the community income was again authoritatively recognized. (*Poe vs. Seaborn* (Wash.) 75 Law Ed. 239-247, 282 U. S. 101-118; *Fred O. Goodell vs. I. B. Koch* (Ariz.) 75 Law Ed. 247, 282 U. S. 118-122; *Jacob O. Bender vs. Wm. Pfaff* (La.), 75 Law Ed. 252, 282 U. S. 127-132; *Geo. C. Hopkins vs. G. W. Bacon*

(Texas), 75 Law Ed. 249,282 U. S. 122-127; *United States v. Malcolm* (Cal), 75 Law Ed. 714, 282 U. S. 792; see also *Warburton v. White*, 176 U. S. 484; *Arnett vs. Reade*, 220 U. S. 311). The Treasury Department accepted these decisions as applicable to the remaining community property states of New Mexico, Idaho and Nevada without the necessity of further test cases.

After the Treasury Department had repeatedly failed to persuade Congress to adopt an amendment to the Revenue Law in 1921, 1924 and again in 1934, amounting in substance to a mandatory joint returns provision applicable only to the eight community partnership states, which were rejected by Congress after public hearings because it ignored local property laws and would have grossly discriminated against the eight community partnership states, the Treasury Department then proposed in 1940 and 1942 a universal "mandatory joint" returns amendment requiring husbands and wives to include all of their separate income (including their partnership income) in a single return, which would have been applicable to husbands and wives in all states. Although this "universal mandatory joint returns proposal" of the Treasury Department would have been uniform in its application to husbands and wives in all states, and would have disregarded the local property laws governing ownership of property in all states, it at least did not discriminate against husbands and wives in the community property states as distinguished from husbands and wives in all the other states.

In open hearings before the Ways and Means Committee in 1942 the proposed universal joint returns amendment was bitterly attacked by representatives of National Women's Organizations as being reactionary and a violation of the independent and separate property

rights of women and was also opposed by taxpayers of the common law states by disregarding local property rights and as constituting a discrimination against married people in favor of single people for tax purposes. The Ways and Means Committee therefore rejected the universal mandatory joint returns proposal of the Treasury Department. A substitute proposal (the same as that which had been repeatedly rejected in prior years) to adopt a mandatory joint returns proposal applicable only to the eight community partnership states, was also rejected by the Committee. (Revenue Revision of 1942, hearings before the Committee on Ways and Means, House of Representatives, 77th Congress, 2nd Session, March 25, 26, 27, 30, 31 — April 1, 2, 3, 7, 8 and 9, 1942, Volume 2.)

Several months after the completion of the public hearings in 1942 and the rejection of the two proposed income tax amendments as unfair and discriminatory, the Committee, during the last few days of its meetings, on the recommendation of the Treasury Department in **executive session** adopted the Community Property Estate Tax Amendments of 1942 which are challenged in the present case. No public hearings were held and no opportunity was given to representatives of the Taxpayers of community property states to oppose and contest the proposed amendments. The provisions and effect of the Estate Tax Amendment are inconsistent with the previous action of the Ways and Means Committee taken in connection with the two proposed income tax amendments and are also inconsistent with the arguments advanced by the Treasury Department in the open hearings in behalf of the community partnership income tax amendment which had been rejected by the Committee several months before.

The legislative history of the last minute adoption of the 1942 Estate Tax Amendments indicates very clearly that they were hastily adopted on the recommendation of the Treasury Department, apparently without any study or careful consideration by the Committee and without Congress having the benefit of a public hearing and discussion by the representatives of the taxpayers of the states involved. The last minute action in executive session by the Committee in adopting the 1942 Community Estate Tax Amendment (Section 402 (b) (2)) is completely inconsistent with the Committee's action taken some months previous in rejecting the community partnership income tax amendment after exhaustive hearings.